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In The

SUPREME COURT OF THE UNITED STATES

No. 5 Original, October Term, 1944.

THE STATE OF NEBRASKA, COMPLAINANT,

V.

THE STATE OF WYOMING, DEFENDANT,

AND

THE STATE OF COLORADO, IMPLEADED DEFENDANT,

THE UNITED STATES OF AMERICA, INTERVENOR.

ANSWER BRIEF OF COMPLAINANT STATE OF NEBRASKA TO BRIEFS FILED ON BEHALF OF THE UNITED STATES AND THE STATES OF COLORADO AND WYOMING.

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Note: The Master's Report and the briefs of the other parties make reference to Nebraska Statutes as found in Compiled Statutes 1929. Since the Master's Report was filed, and in December, 1944, Nebraska Revised Statutes 1943 has been published and become effective. For the convenience of the Court and parties, we are endeavoring to give parallel references to both of

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these publications. No substantial change was made in the sections which are important in this case.

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ANSWER BRIEF OF COMPLAINANT STATE OF NEBRASKA TO BRIEFS FILED ON BEHALF OF THE UNITED STATES AND THE STATES OF COLORADO AND WYOMING.

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Special Counsel,
Attorneys for Complainant.

INTRODUCTORY.

This brief is in answer to the respective briefs of the United States, Colorado and Wyoming. Since the topics

dealt with in those briefs respectively are, for the most part, entirely distinct, it seems desirable to separate the answers to the respective briefs, and therefore they are made separately and are found herein under appropriate headings.

ANSWER TO BRIEF OF UNITED STATES.

I.

The United States Claim to Ownership of Water Independent of the States.

First, for discussion, we desire to take up Points 1 and 3 of the brief of the United States, which refer to United States Exceptions I, III, V, X, XIII, XIV and XVII.

In order to make our position clear, we desire first to state our understanding of the position of the United States and the claims made on its behalf by its counsel.

It appears that they claim the original ownership by the United States of both the land and all rights that may be subject to ownership in the flowing waters in the three states involved. The claim is further that under the applicable federal legislation, rights have been acquired by individuals by appropriation under state laws which are senior in point of priority to the rights of the United States, the rights of such individuals not being subject to control by the United States. The claim is further that on the dates when applications were filed by or in the name of the Secretary of the Interior to the state irrigation authorities for the appropriation of waters for government projects, the United States "reserved" the

amount of water needed for those projects; and that any water not needed and so reserved was subject to subsequent appropriation by individuals in accordance with state laws.

We further understand the claim to be made that the United States is entitled to the control of the use of the waters of the North Platte and Kendrick Projects without reference to state law. Thus the issue is extremely narrow in its final practical effects, and so far as we can see the contentions of the United States can be summed up as follows:

1. Appropriators having rights vested prior to the initiation of the government projects respectively have rights in the waters of the North Platte River senior to those of the government. That is to say appropriators having rights vested prior to the 1904 filing date are senior to it and must be supplied with water before the needs are supplied for the portions of the North Platte Project having such priority date as well as the other portion of the North Platte Project and the Kendrick Project; private appropriators having priority dates junior to the 1904 filing date and senior to the Guernsey filing date have rights junior to the earlier portions of the North Platte Project but senior to the Guernsey and to the Kendrick. Similar rules would apply in relation to the Seminoe and the Casper Alcova Irrigation District, the two units of the Kendrick Project.

2. All elements of distribution of water and administration within the projects respectively are subject solely to the control of the United States in the use of the waters without reference to state law.

3. The question of how the various government projects are to be articulated into the administration of the stream system seems to be left open, and counsel for the United States do not inform us how they expect legal relationships to be put into operation as a practical matter. If there are on the river appropritaions senior to the government project (which appears to be conceded) some method must be devised by which the government project can be regulated for the benefit of those seniors. If the state authorities do not have the power to make such regulation, it is difficult to see how the water users under the government project would have the right to invoke the powers of state authorities to enforce their prior rights against such private appropriators from the streams as were junior to the government projects. As juniors they should be subject to regulation for the benefit of seniors if they wish their right to be protected in their seniority as against those who happen to be junior to them.

Thus it would seem that there are three major questions: first, whether the operation of the government projects is subject to state laws, second, whether state administrative authorities have jurisdiction over such operations and, third, how the operations of the government projects are to be articulated with priorities acquired by private appropriators under state law without the cooperation of a governmental agency.

Counsel for the United States have presented their views only on the first two of these questions and have ignored the third, which is a matter of tremendous practical importance in relation to the administration of the river in which the government projects must exist side

by side with those initiated and developed with private capital.

A.

THE NATURE OF WATER RIGHTS AND OF WATER CONTROL.

We believe that the brief of counsel for the United States shows a certain amount of confusion due to failure to recognize certain fundamental distinctions which are essential in matters of water law and of water rights and water control. These distinctions have to do, first, with the nature of rights in flowing water, and, second, with the nature of control.

1. The Nature of Water Rights.

Too often throughout the entire proceedings in this case all of counsel have loosely spoken of "ownership of water." Ownership is not, of course, the proper term, and it will be conceded by all parties that it is improper to refer to ownership of flowing water, but that nothing is the subject of ownership except the usufructuary rights in those waters. Such usufructuary rights are a species of property and are capable of private ownership. The corpus of the water, however, is not subject to private ownership, but, as the civil lawyers term it, is, "publici juris."

Because of its fugitive nature, flowing water is not subject to ownership. Neither under the system of riparian rights nor under the system of appropriative rights is there any private ownership of the water itself as such. All that exists or can exist is the right to make use of the water, such right varying as to the law ap-

plicable. Under the law of riparian rights strictly applied no use can be made (as against the objection of lower riparian owners) which will diminish the water in volume or impair its quality (*McCarter* v. *Hudson County Water Company*, 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197; affirmed 209 U. S. 347, 52 L. Ed. 828). Under the law of appropriation, running water can be taken for beneficial use, but the right is limited by such beneficial use, and when the use ceases the right ceases (30 Am. Jur., page 616, Irrigation, Section 28; *Atchison* v. *Peterson*, 87 U. S. 507, 22 L. Ed. 414).

In *Mitchell* v. *Warner*, 5 Conn. 497, the rule is stated as follows:

> "Water is neither land nor tenement, nor susceptible of absolute ownership. It is a moveable, wandering thing; and must, of necessity, continue common by the law of nature. It admits only of a transient, usufructuary property; and if it escape for a moment, the right to it is gone forever; the qualified owner having no legal power of reclamation. Consistently with the preceding remarks, it is not capable of being sued for, by the name of water, or by a calculation of its cubical or superficial measure; but the suit must be brought for the land that lies at the bottom covered with water."

In 50 C. J. 740, the following is laid down as the rule:

> "Some things, from their nature, such as light, air, water, mineral oil, mineral gas, and wild animals, must necessarily remain common, subject only to a usufructuary right or to be considered as property only when and while reduced to, and retained in, possession."

The nature of running water as being publici juris is borne out in the opinion in *Mohl* v. *Lamar Canal Company*, 128 Fed. 776 at 778, as follows:

"I am unable to perceive an element of contract with the United States or with the state of Colorado in the whole course of the bill. The waters of flowing streams are publici juris—the gift of God to all His creatures. Blackstone (book 2, p. 14) has the following:

" 'But after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water.'

"A paragraph from Kent's Commentaries often quoted by the courts is a clear statement of the common law:

" 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. "Aqua currit et debet curre ut currere solebat." Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must

return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant or an uninterupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty which arises consists in the application. 3 Kent's Commentaries; 439, side paging.' "

The same principle is also clearly stated in the opinion of Mr. Justice Brewer in *Kansas* v. *Colorado*, 206 U. S. 46 at page 103 to 105, 51 L. Ed. 956 at page 977. In this quotation the court is discussing the question of the rights of the State of Kansas as based upon the riparian right doctrine. It is obvious, however, that whether the riparian right or appropriative doctrine is applied to the administrataion of waters, in either event the fundamental nature of rights to water is the same. The quotation is as follows:

"And in the opinion (Clark v. Allaman, 71 Kan. 206, 70 L. R. A. 971, 80 Pac. 571), on pages 242, 243, L. R. A. pp. 986, 987, Pac. p. 584, are quoted these observations of Chief Justice Shaw in the case of Elliot v. Fitchburg R. Co., 10 Cush. 191, 193, 196, 57 Am. Dec. 85, 87, 88:

" 'The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not

wholly obstructed or diverted or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook, passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, to a considerable extent a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes. * * *

" 'The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie.' "

In United States Department of Agriculture publication No. 418 (1942), "Selected Problems in the Law of Water

Rights in the West," by Wells A. Hutchins, the following is stated (p. 27):

> "The water right which attaches to a watercourse is a right to the use of the flow, not a private ownership in the corpus of the water. This is the case, whether the water right is grounded upon ownership of riparian land or upon the statutory right of appropriation, discussed hereinafter. And this right of use is a property right, entitled to protection to the same extent as other forms of property.
>
> "Wiel (Wiel, S. C., Water Rights in the Western States, 3d ed., vol. I, sec. 18, pp. 18-19) quotes the following from two California cases:
>
> " 'It is laid down by our law-writers that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use.'
>
> " 'A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself * * * In regard to the water of the stream, his rights (an appropriator's), like those of a riparian owner, are strictly *usufructuary*, and the rules of law by which they are governed are perfectly well settled.'
>
> "The Utah Supreme Court has stated (Bear Lake & River Waterworks & Irr. Co. v. Ogden [8 Utah 494, 33 Pac. 135 (1893)]):
>
> " 'Water flowing in a natural stream or in a ditch it not subject to ownership, so far as the corpus of the water is concerned. The right to use it is a hereditament appurtenant to land.'

"A California case contains this statement (Palmer v. Railroad Commission [167 Cal. 163, 138 Pac. 997 (1914)]):

"'The true reason for the rule that there can be no property in the *corpus* of the water running in a stream is not that it is dedicated to the public, but because of the fact that so long as it continues to run there cannot be that possession of it which is essential to ownership.'

"And a recent California decision, in criticizing the trial court's use of the term 'own,' reaffirmed the principle that the riparian does not own the water of a stream, but 'owns' only a usufructuary right—the right of reasonable use of the water on his riparian land when he needs it. (Rancho Santa Margarita v. Vail [11 Cal. (2d) 501, 81 Pac. (2d) 533 (1938)].) The Nevada Supreme Court states, further, that no title can be acquired to public waters by capture or otherwise, but only a usufructuary right can be obtained therein. (State, ex rel. Hinckley v. Sixth Judicial District Court [53 Nev. 343, 1 Pac. (2d) 105 (1931)].)"

See also 2 Blackstone Comm. pp. 14 to 18.

The above analysis is elementary, but is too often lost sight of. For some purposes, convenience is served by referring briefly to "ownership of water" when the writer or speaker actually means "ownership of usufructuary rights in water." This convenient method of speaking has been used by all parties to the litigation and by most witnesses without harm until it comes to the point of analyzing the claims of the United States. In that point, however, such careless use of language leads to the confusion evidenced in the brief filed by counsel for the United States.

2. Sovereign As Opposed to Proprietary Rights.

Further confusion is imported into the solution of the problem by failure to distinguish between rights of a proprietor and sovereign powers. This is particularly important where the controversy exists as between the United States government which represents a portion of the sovereignty existing, and the state governments respectively which represent the remaining portion. The United States government is, of course, a government of limited powers with the residuary power remaining in the various state governments.

Of course, the United States can become the owner of real estate. Within the limitations of the powers granted to the federal government by the United States Constitution, this ownership is not subject to interference by any state statute, even a statute of the state where the property is located. However, when the ownership by the United States government of such real estate is not required for the purposes which the United States government must exercise in order to carry out its functions under the federal constitution, the right of the United States to become the owner of real estate within a state is subject to the sovereign laws of that state.

Thus, in *United States* v. *Fox*, 94 U. S. 315, 24 L. Ed. 192, a testator devised certain real estate in the State of New York to the government of the United States for the purpose of assisting to discharge the debt created by the War of the Rebellion. This was held by the New York Court of Appeals to be a violation of the law of the State of New York. The United States Supreme Court held that the New York statute controlled; that the decision of the New York Court of Appeals

holding that the United States was not within the list of persons or corporations empowered to take real estate by devise in New York was conclusive on the federal courts, and finally held that the devise to the United States was void as being in violation of the New York statute.

Of course, when the United States was the owner of the land before the admission of the state to the union, no question can be raised as to the power of the United States to own the land then constituting part of the public domain. In fact in relation to the three states involved in this litigation, the states were themselves created out of the public domain. However, after their admission to the union, these states are upon an equality with states such as New York and have the same powers of sovereignty over the land and other property within their borders.

B.

THE EFFECT OF STATE SOVEREIGNTY IN CONNECTION WITH WATER RIGHTS.

It necessarily follows from the analysis just made that the states are sovereign over water rights within the state, and this is the rule as laid down by the Supreme Court of the United States. In *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, at pages 702 to 703, 43 L. Ed. 1136, at page 1141, the court said:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, sec. 439):

"'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currer ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.'

"While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common-law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the legislature of a territory, we do not deem it necessary for the purposes of this case to inquire. We concede, *arguendo*, that it does.

"Although this power of changing the common-law rule as to streams within its dominion undoubterly belongs in each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the govern-

ment property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

The above language was quoted with approval in *Kansas* v. *Colorado*, 206 U. S. 46, at page 86, 51 L. Ed. 956, at page 970. In commenting upon it Mr. Justice Brewer used the following language:

> "It follows from this that if, in the present case, the national government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it distinctly asserts that the Arkansas river is not now and never was practically navigable beyond Fort Gibson in the Indian territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability."

Mr. Justice Brewer went on to discuss the contentions of the government as to inherent powers of the United States to provide for reclamation of arid lands. He rejected the theory that Article 1, Section 8 of the Constitution of the United States gave that authority and then went on to discuss the provisions of the second paragraph of Section 3 of Article 4 of the Constitution, upon which counsel for the United States now base their entire claim of the superior powers of the federal government. In that connection he went on to say (206 U. S., pages 88 to 94, 51 L. Ed., pages 971 to 973):

> "We must look beyond Sec. 8 for congressional authority over arid lands, and it is said to be found

in the second paragraph of Sec. 3 of article 4, reading: 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.'

"The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words 'territory or other property.' It is true it has been referred to in some decisions as granting political and legislative control over the territories as distinguished from the states of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the government relies upon 'the doctrine of sovereign and inherent power'; adding, 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the

nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers.

* * *

"This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But, if no such power has been granted, none can be exercised.

"It does not follow from this that the national government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them, by virtue of the second paragraph of Sec. 3 of article 4, heretofore quoted, or by virtue of the power vested in the national government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the Western states, the national government is the most considerable owner and has power to dispose of and

make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in the Western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen; and it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation. As said by Mr. Justice White, delivering the opinion of the court in Gutierres v. Albuquerque Land & Irrig. Co., 188 U. S. 545, 554, 47 L. Ed. 588, 593, 23 Sup. Ct. Rep. 338, 341, after referring to previous legislation:

" 'It may be observed that the purport of the previous acts is reflexively illustrated by the act of June 17, 1902 (32 Stat. at L. 388, chap. 1093, U. S. Comp. Stat. Supp. 1905, p. 349). That act appropriated the receipts from the sale and disposal of the public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands. The 8th section of the act is as follows:

" 'Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws,

and nothing herein shall in any way affect any right of any state, or of the Federal government, or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997; Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565; Goodtitle ex dem. Pollard v. Kibbe, 9 How. 471, 13 L. Ed. 220; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; St. Louis v. Myers, 113 U. S. 566, 28 L. Ed. 1131, 5 Sup. Ct. Rep. 640; Packer v. Bird, 137 U. S. 661, 34 L. Ed. 819, 11 Sup. Ct. Rep. 210; Hardin v. Jordan, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 35 L. Ed. 1004, 12 Sup. Ct. Rep. 173; Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349, 42 L. Ed. 497, 18 Sup. Ct. Rep. 157; Kean v. Calumet Canal & Improv. Co., 190 U. S. 452, 47 L. Ed. 1134, 23 Sup. Ct. Rep. 651. In Barney v. Keokuk, supra, Mr. Justice Bradley said (p. 338, L. Ed. p. 228):

" 'And since this court, in the case of The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. Ed. 1058, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amena-

ble to the admiralty jurisdiction, there seems to be no sound reasons for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.'

"In Hardin v. Jordan, supra, the same justice, after stating that the title to the shore and lands under water is in the state, added (pp. 381, 382, L. Ed. p. 433, Sup. Ct. Rep. p. 812):

" 'Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. * * * Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. * * * This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised.'

"It may determine for itself whether the common-law rule in respect to riparian rights or that

doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state."

It is interesting to note that counsel for the United States attempt to escape from the effect of this definite exposition of the constitutional powers of the federal government by stating that the question of the ownership of the federal government of the waters was not put forward. The very fact that the argument was not made affords evidence that the entire theory now advanced by counsel for the United States is an afterthought and not one that either Congress or the courts or the administrative departments of the United States government could have had in mind.

The language in *United States* v. *Rio Grande Dam and Irrigation Company* was recently again reaffirmed in *California Oregon Power Company* v. *Beaver Portland Cement Company*, 295 U. S. 142, 79 L. Ed. 1356. The court in discussing the Rio Grande case used the following language (295 U. S. 158 to 160, 79 L. Ed. 1362):

"In United States v. Rio Grande Dam & Irrig. Co., 174 U. S. 690, 43 L. Ed. 1136, 19 S. Ct. 770, the government sought to enjoin the irrigation company from constructing a dam across the Rio Grande River in the Territory of New Mexico, and from appropriating the waters of that stream. The object of the company was to impound the waters and distribute the same for a variety of purposes. The company defended on the ground that the site of the dam was within the arid region, and that it had fully complied with the water laws of the Territory

of New Mexico in which the dam was located and the waters were to be used. The supreme court of the territory affirmed a decree dismissing the bill. This court reversed and remanded the case, with instructions to inquire whether the construction of the dam and appropriation of water would substantially diminish the navigability of the stream, and, if so, to enter a decree restraining the acts of the appellees to the extent of the threatened diminution. The opinion, dealing with the question of riparian rights, said that it was within the power of any state to change the common-law rule and permit the appropriation of the flowing waters for any purpose it deemed wise. Whether a territory had the same power the court did not then decide. Two limitations of state power were suggested: first, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow—so far, at least, as might be necessary for the beneficial use of the government property; and second, that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. With these exceptions, the court, however, thought (p. 706) that by the acts of 1866 and 1877 'Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow,' and that 'the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries.' And see Bean v. Morris, 221 U. S. 485, 487, 55 L. Ed. 821, 823, 31 S. Ct. 703; Van Dyke v. Midnight Sun Min. & Ditch Co., (C. C. A. 9th) 177 F. 85, 88-91."

Since no question of navigability enters into this controversy, it must be taken as the rule that each state is sovereign over the water rights to waters flowing in streams within its dominion subject only as to interstate streams to the correlative rights of other states and subject to the rights of the United States as the owner of lands bordering on a stream to continued flow so far as may be necessary for the beneficial uses of the government property.

When the United States became the owner of the lands contained in the Louisiana Purchase, which include most of the lands within the three states herein involved, it must be presumed that it was the intention that the common law should apply to the lands and waters within that territory. Thus the rule clearly applies that the water in the flowing streams is owned in common subject to such usufructuary rights as the states may, as sovereigns, elect to set up. This presumption is reinforced by the acts of congress of 1866 and 1877 referred to in the brief filed on behalf of the United States, and except as to the power which the government has to assure sufficient water for beneficial uses of government property, the authority of the state is supreme.

We believe that the exercise of that power to assure water for beneficial use upon property then in government ownership came about in the Reclamation Act of 1902. The action taken by the United States at that time was that of transferring the land to private ownership and assuring those lands of water rights under and subject to state laws. Possibly, the United States might have retained the ownership or control of those lands in which case the United States would have re-

tained ownership of usufructuary rights in waters sufficient to assure the use of that land. This was done in connection with the Indian lands which are the subject of the decision in *Winters* v. *United States*, 207 U. S. 564, hereinafter referred to.

A full analysis and discussion will hereinafter be made of the effect of the Reclamation Act and its meaning. In reference, however, to the case of *United States* v. *Rio Grande Dam and Irrigation Company*, above cited, it seems obvious that the act must be construed in the light of that decision; must have been for the purpose of utilizing the water rights in relation to the land then owned by the United States by transferring those lands to private ownership and assuring water rights subject to state laws to the owners of such lands.

In *Bean* v. *Morris*, 221 U. S. 485, 55 L. Ed. 821, Mr. Justice Holmes used the following language as to the powers of the states:

> "The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory (Rev. Stat. Sections 2339, 2340, U. S. Comp. Stat. 1901, p. 1437; act of March 3, 1877, chap. 107, 19 Stat. at L. 377, U. S. Comp. Stat. 1901, p. 1548), and is recognized by both states now. Before the state lines were drawn, of course, the principle prevailed between the lands that were destined to be thus artifically divided. Indeed, Morris had made his appropriation before either state was admitted to the Union. The only reasonable presumption is that the states, upon their incorporation, continued the

system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed. See Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Smith v. Denniff, 24 Mont. 20, 50 L. R. A. 741, 81 Am. St. Rep. 408, 60 Pac. 398."

C.

SUMMARY AS TO BASIC RULES.

We believe that, except for navigable waters and waters in relation to Indian lands which are not involved in this controversy, the following is the true statement of the basic law of water in those states which were originally a part of the Louisiana Purchase:

1. The corpus of running water is *publici juris*, is not the subject of ownership and is common property of the public in the same way as are light, air and wild animals.

2. Usufructuary rights may be obtained in flowing water and such rights are privately owned. The nature of such rights and their incidents will vary according to the jurisdiction and may be confined to the strict common law riparian rights; or they may be modified riparian rights permitting reasonable use, or they may be strictly appropriative rights.

3. The local sovereign has exclusive power to define and govern those rights. That power resides solely in the respective states after they have been admitted to the Union.

4. The United States cannot be deprived by any local law of usufructuary rights in flowing water which may

be needed by the United States for the purpose of enhancing the usefulness of lands owned by the United States and bordering on the streams.

5. Congress has the power to legislate with reference to those lands; and since it has elected to transfer those lands to private ownership subject to state law, the usufructuary rights necessary for their development are likewise made subject to the same state laws.

II.

Federal Legislation.

A.

INTRODUCTORY.

It is the contention of the State of Nebraska that the question of the basic rights and constitutional powers of the states in relation to the federal government on waters in the states involved, is actually a moot question for the reason that the federal legislation touching upon the subject clearly indicates the intention of Congress that both the land and all rights in water shall be held by individuals subject to state laws. Obviously, no executive or administrative department can assert rights on behalf of the United States except in accordance with the appropriate acts of Congress. It will be unquestioned that whatever may be the desire or the actions of the Bureau of Reclamation, the General Land Office, or any other federal administrative agency, it is bound by the acts of Congress, and Congress alone can lay down the laws and rules relating to both the governmental and proprietary interests of the United States. Accordingly, if the congressional acts mean what Nebraska contends them to mean, it does not matter whether basically the

United States government had a proprietary or sovereign interest in the waters in the three states involved superior to the claims of the states, or whether the state control would be paramount in the absence of federal legislation. The same result is reached and there is no necessity to inquire as to whether state sovereignty and control over the disposition of water rights is inherent or derivative. There is no need to discuss what would be the effect of federal legislation which might conflict with state legislation and state administration.

In discussing the problem involved in this case, all questions of navigability and effect of use of non-navigable waters upon navigable streams, must be set aside. All parties to this litigation concede that the North Platte River is non-navigable and no contention has been made by any of the parties, including the United States, that the irrigation or other uses which are involved in the case can or would affect navigability. At a later point in this brief we will discuss the matter of the effect of the decisions concerning ownership of the beds of navigable streams.

Equally, we must distinguish questions of water rights which may be needed for the purpose of the proper use of land by the Indians. Such questions can have no bearing upon the rights in the North Platte non-navigable waters, which are actually the subject matter of this litigation.

We believe that it is clear from the federal acts of 1866, 1870, 1877, 1894, 1902 and 1911 that a continuous thread of intention is evidenced, and that the purpose of Congress in carrying out its powers to protect the

proprietary interests of the government in waters needed for lands on the public domain is to transfer those lands (other than Indian reservations) to private individuals and to provide that the rights in water are to be enjoyed under state laws.

It is our contention, not that the states own the rights in water, but rather that they have the power to govern and control them. It is thus our contention that individuals own such rights in water as are created by state legislation, and that those rights are subject to state regulation, control and administrative authority.

B.

THE ACTS OF 1866, 1870, 1877 AND 1894.

There can be no question but that prior to the enactment of the Reclamation Act in 1902, the purpose of all federal legislation was to place the lands on the public domain in the hands of individual settlers subject to state laws. The only exceptions are such lands as were reserved for the use of the Indians upon Indian reservations (usually provided for by treaty with the Indian tribes) and such lands as the federal government deemed necessary or useful for military and similar federal purposes. Equally the federal legislation was all designed to make possible the acquisition under state laws of water rights in the flowing streams for use by the settlers upon the lands transferred to such settlers. The only exception thereto is, as pointed out in *United States* v. *Rio Grande Dam and Irrigation Company,* that the depletion of waters of non-navigable streams should not be allowed to affect the navigability of those navigable streams to which the non-navigable streams are tribu-

tary; and state laws could not deprive the United States government of the equal right to make use of waters upon lands retained in the public domain subject, of course, to prior rights already vested.

Some discussion of these acts is necessary, but we believe that the above statement of the principles and purposes of those acts will be undisputed.

1. The Acts of 1866 and 1870.

These two acts should be treated together, since the act of 1870 was supplementary and intended to clarify and make certain the purposes of the act of 1866. The act of 1866 (July 26, 1866, 14 Stat. 251, U. S. C. A. Title 43, Section 661) was designed for the purpose of recognition of rights of settlers and patentees of public lands in appropriative rights to the waters of the flowing streams of the western states. It has been many times interpreted by this court, and its meaning is beyond question. (See *Atchison* v. *Peterson*, 20 Wallace 507, 22 L. Ed. 414; *Basey* v. *Gallagher*, 20 Wallace 670, 22 L. Ed. 452; *Jennison* v. *Kirk*, 98 U. S. 453, 25 L. Ed. 240; *Broder* v. *Notoma Water and Mining Company*, 101 U. S. 274, 25 L. Ed. 790; *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 43 L. Ed. 1136; *California Oregon Power Company* v. *Beaver Portland Cement Company*, 295 U. S. 142, 75 L. Ed. 1356.) As stated in the last three named cases, this provision was "rather a voluntary recognition of a pre-existing right of possession constituting a valid claim to its continued use, than the establishment of a new one."

Since it was also a recognition of the right of the states to control the waters, it surely can equally be said

that it was a voluntary recognition of a pre-existing right of control constituting a valid claim to continued control.

The act of July 9, 1870, 16 Stat. 217, U. S. C. A. Title 30, Section 52, Title 43, Section 661, was an amendment of the act of 1866 for the purpose of assuring that patents subsequently issued conveying public lands to private individuals should in all cases be subject to the water rights acquired under state law.

This again, as we contend, was a recognition of a pre-existing right of the states to control rather than the grant of any new right.

Unquestionably, these two acts were designed for the purpose of assuring to private individuals ownership of lands and rights in water, both to be subject to control of the laws of the states in which the lands and the waters are located. Counsel for the United States impliedly recognize this when in their brief they concede that the United States has no rights paramount to those acquired under state laws by individual settlers as recognized by the acts of 1866 and 1870.

2. The Desert Land Act of 1877.

On March 3, 1877, the Congress passed the Desert Land Act (19 Stat. 377, U. S. C. A. Title 43, Section 221). This act was passed for the purpose of facilitating the settlement of the public lands in the desert land states and their reclamation by private individuals under state laws. It likewise has many times been interpreted by this court especially in *United States* v. *Rio Grande Dam and Irrigation Iompany,* 174 U. S. 690, 43 L. Ed. 1136, and, in *California Oregon Power Company* v.

Beaver Portland Cement Company, 295 U. S. 143, 79 L. Ed. 1356. We quote from Mr. Justice Sutherland's opinion in the latter case (295 U. S. 158, 79 L. Ed. 1361-1362):

> "In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. By its terms, not only all surplus water over and above such as might be appropriated and used by the desert-land entrymen, but 'the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable,' were to remain 'free for the appropriation and use of the public for irrigation, mining and manufacturing purposes. If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed. While this court thus far has not found it necessary to determine that precise question, its words, so far as they go, tend strongly to support the conclusion which we have suggested."

As will later be seen, the opinions of Mr. Justice Sutherland upon this subject are of particular importance, and his opinion in this case, as well as in *Ickes* v. *Fox*, 300 U. S. 82, 81 L. Ed. 525, and in *Brush* v. *Commissioner of Internal Revenue*, 300 U. S. 352, 81 L. Ed. 691, coupled with his legislative experience in the House of Representatives and in the Senate and as President of The American Bar Association in 1917 rendered him

singularly fitted to write the definitive opinions of this court on the subject of the fundamentals of water rights.

Counsel for the United States attempt in many pages of their brief to escape from the effect of Mr. Justice Sutherland's language. Whatever may be said about it, at the very least it establishes the intention of Congress that state laws and state administrative control should prevail in connection with the waters of the western states, and that so far as the United States was still proprietor of the lands therein contained, the rules of riparian rights should no longer be in existence, but that the waters should be opened to appropriation under the laws of the respective states. This act of 1877, as we contend, was a recognition of a pre-existing right so far as state control is concerned. We do not contend that it constituted a "dedication" to the public nor a grant. It was a recognition of the fundamental fact that by the laws of nature, running water must be public in character subject to use by individuals under the laws of the sovereign power existing in the area where the waters are available. It is further a recognition that the sovereign (in this instance the state) must have the power of control.

3. The Carey Act of August 18, 1894.

The next step in public aid of the development of irrigation and agriculture in the western states came about through the passage of the Carey Act on August 18, 1894 (28 Stat. 422, U. S. C. A. Title 43, Section 641). This act is not discussed by counsel for the United States and while it has no direct bearing upon the problems of the North Platte River, it is of great importance as evidencing the continued intention of the United States

government that the public lands should be developed by their transfer to individual owners, and their irrigation under water rights acquired and administered under state laws. The Carey Act provided for the actual transfer of the lands, before their settlement, to the respective states and for development and reclamation through projects initiated and fostered by the states. It was another step in the progress of development of the western lands, but was limited in its effectiveness by the comparatively meager resources of those western states and their limited ability to attract private capital in bringing about that development. There can be no question, however, of the intention of Congress in passing the Carey Act that the state laws should control and that administrative authorities of the states should have the powers of administration.

C.

THE ACT OF 1902.

We come now to the act of June 17, 1902, 32 Stat. 388, known as the Reclamation Act. It does not appear in consecutive form in the United States Code but Section 8, the one most in controversy here, is found in U. S. C. A. Title 43, Sections 372 and 383. The 1902 act is of chief importance for the reason that the claim made by counsel for the United States of "Reservation of Waters" is based upon the acts done by the Secretary of the Interior and the Bureau of Reclamation purportedly under the authority of this act.

By this act, for the first time Congress undertook to use federal money and federal agencies for the development of water resources and for making them available

for use upon lands. This court had decided the case of *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 43 L. Ed. 1136, on May 22, 1899. In that case the rule had been announced that the states could not by their legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow of its waters so far, at least, as might be necessary for the beneficial uses of the government property. Clearly, the Reclamation Act of 1902 was intended for the purpose of asserting those powers which, as this court had said, were inherent in the United States as the owner of the lands bordering on the streams. The question to which counsel for the United States direct their argument is whether or not the United States, by this act, asserted control of the waters independent of the state government. It is our contention that there was no such assertion, but on the contrary, that the act involved no departure from the previous course of legislation and was intended to create ownership by individuals of the land and to assure to those individuals water rights in the flowing streams subject to state laws and state control.

1. History of the Legislation.

It is, of course, elementary that in considering the effect of legislation, when doubt is raised as to its meaning, the court will resort to the legislative history including the steps taken at the inception of the legislation, congressional committee reports and debates in both houses. *Jennison* v. *Kirk*, 98 U. S. 453, 25 L. Ed. 240; *Wright* v. *Mountain Trust Company*, 300 U. S. 440, at pages 458 to 464, 81 L. Ed. 736, at pages 741 to 744; *United States* v. *City of San Francisco*, 310 U. S. 16, 84

L. Ed. 1050. Attached hereto in the Appendix are extracts from the historical documents insofar as they bear upon the subject of state and federal control including the portion of President Roosevelt's message to Congress of December, 1901, which deals with the subject, an extract from the House Committee report and extracts from the debates as reported in the Congressional Record. Specific reference will be made hereinafter in the body of this brief to some of the things contained in these documents.

The party platforms of both the Republican and Democratic parties for the election of 1900 advocated the reclamation of the lands of the arid states by federal aid.

The first session of the 57th Congress, which was elected in 1900, began in December, 1901, when Theodore Roosevelt, as Vice President, had succeeded to the presidency upon the assassination of President McKinley. In Theodore Roosevelt's presidential message of December, 1901, he devoted a considerable portion to this subject. This entire section of his message is set out in full in the Appendix. Two things are outstanding in the message. One is the clear recommendation of the President that legislation should provide for the development of water rights and their administration under state laws, and second, that insofar as the President deemed those state laws to be inadequate, there should be no attempt to supersede those state laws by federal legislation, but rather through the system of rewards by federal aid, the states should themselves be induced to reform their own laws and regulations governing irrigation. Both of these are evidenced by the following quotation:

"There remain, however, vast areas of public land which can be made available for homestead settlement, but only by reservoirs and mainline canals impracticable for private enterprise. These irrigation works should be built by the National Government. The lands reclaimed by them should be reserved by the Government for actual settlers, and the cost of construction should so far as possible be repaid by the land reclaimed. *The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights.* The policy of the National Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation." (Emphasis supplied.)

Again at the conclusion of this portion of the presidential message, the following appears:

"Our aim should be not simply to reclaim the largest area of land and provide homes for the largest number of people, but to create for this new industry the best possible social and industrial conditions; and this requires that we not only understand the existing situation, but avail ourselves to the best experience of the time in the solution of its problems. A careful study should be made, both by the Nation and the States, of the irrigation laws and conditions here and abroad. Ultimately it will probably be necessary for the nation to co-operate with the several arid States in proportion as these States by their legislation and administration show themselves fit to receive it."

There is no question but that Nebraska's contentions as to the meaning of the Reclamation Act are fully borne out by this presidential message so far as it is important in this connection.

Following the receipt of the message from President Roosevelt, conferences were held of the Senators and Representatives from the western states regardless of party. Growing out of these conferences, a bill was drafted and introduced into the Senate as a non-partisan measure as S3057. It passed the Senate in practically the form in which it was finally adopted and signed by the president. However, the House Committee recommended a verbal change of the provisions of Section 8. Counsel for the United States in their brief, pages 104 to 105, try to make much of this verbal change. As passed by the Senate, instead of the provision that the Secretary of the Interior, in carrying into effect the act, shall proceed in conformity with state laws, the Senate version of the bill provided, "state and territorial laws shall govern and control in the appropriation, use and distribution of the waters rendered available by the works constructed under the provisions of this act."

The change is, as stated by counsel for the United States, the result of a recommendation of the House Committee and is found in the House Committee Report No. 1468, 57th Congress, First Session. A reading of this report demonstrates that no substantial change in the meaning or effect of Section 8 was intended. The report gives no reason for the change, but the following appears on pages 6 and 7 of the report in the discussion of the meaning of the various sections of the act:

"Section 8 recognizes State control over waters of non-navigable streams such as are used in irrigation, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to such laws. It also provides that nothing in the act shall be held as changing the rule of priorities on interstate streams. In order that the water rights acquired under the provisions of the act shall be of the character most approved by centuries of irrigation practice, and such as will absolutely insure the user in his right and prevent the possibility of speculative use of water rights, the character of the right which is contemplated under the act is clearly defined to be that of appurtenance or inseparability from the lands irrigated and founded on and limited by beneficial use. Under this section uniformity of record of the rights is secured and the rules of priorities of rights are not disturbed, while the cost of maintaining the administrative machinery of water distribution is placed on users and the States; the Government is free from all expense or responsibility when projects are completed and paid for.

"The character of the water rights contemplated being clearly defined, the Secretary of the Interior would not be authorized to begin construction of works for the irrigation of lands in any State or Territory until satisfied that the laws of said State or Territory fully recognized and protected water rights of the character contemplated. This feature of the bill will undoubtedly tend to uniformity and perfection of water laws throughout the region affected."

In this connection it is noteworthy that an attempt was made from the floor of the House to amend the bill to give it the meaning for which counsel for the United States now contend. It appears that an amendment was offered by Representative Stevens of Texas to add the

following to Section 8 (see Cong. Record, Vol. 35, 57th Cong., 1st Session, p. 6766):

> "PROVIDED FURTHER that Congress shall for the purpose of equitable distribution, have the absolute jurisdiction and control of the previouslv unappropriated waters of the rivers and streams flowing past, through or from any State or Territory of the United States into, through or past any other State or Territory and necessary for the purposes of navigation or irrigation and to which waters others have rights by prior appropriation."

This amendment was rejected without a record vote. It is obvious that if the house had intended to change the meaning of the Senate version of Section 8 so as to provide for and assert federal control of the unappropriated waters, this amendment or one similar in substance would have been adopted instead of the language which required the Secretary of the Interior to proceed in accordance with state laws.

Since no attempt up till the date of the introduction of this act had been made to assert federal control of the unappropriated waters, and since the universal rule then in existence was one of state control, state administration and state laws governing distribution, if Congress had intended to change that rule, language clearly appropriate to that purpose would have been adopted, and the issue was placed squarely before the House by the amendment offered by Representative Stevens.

Counsel for the United States further lay stress upon the fact that Section 8 of the act speaks of water rights as appurtenant to the lands, and on pages 102 and 103 of their brief they go into an extended discussion of that

subject. This argument is clearly due to a misunderstanding of the meaning and purpose of the language of Section 8 as to appurtenance of water rights. It is apparent from the committee report quoted above (Appendix), that the provision as to appurtenance of water rights was not intended to be self-executing. On the contrary, it carried out President Roosevelt's suggestion that federal aid was to be given in those states whose laws conformed to the ideas of the Reclamation Act, and this provision of the act was intended as an inducement to the states to reform their laws. Congress intended that the Bureau of Reclamation should only operate projects in states whose laws made water rights appurtenant to land, such as Nebraska and Wyoming.

It happens that in the House, more complete debate took place upon this subject, namely, federal vs. state control, than took place in the Senate. The debates are too long to set out in full in the body of the brief, but all of the pertinent portions which we have been able to discover are set out in Appendix). We wish particularly to call attention to the introductory remarks of Representative Mondell of Wyoming who had charge of the legislation during the course of its passage (Appendix). Representative Ray of New York seems to have borne the brunt of opposition to the bill, and his objections seem to have centered around the fact that the government was spending the money and yet would not have control. Thus, by his very objections, Representative Ray demonstrated that the meaning of the act was as we contend.

Most important, however, are the remarks of Representative George Sutherland of Utah commencing on

page 6770 of Volume 35, Congressional Record, 57th Congress, First Session. Because of their importance we repeat them here in full:

(P. 6770.) "Mr. Sutherland: But it is said that the bill contains conflicting provisions; that it contemplates a divided control; that as soon as a major portion of the lands to be irrigated under any particular enterprise has been paid for, the control, the management, the operation of the irrigation works shall pass to the owners of the lands, but that the title to and the management and operation of the reservoirs and works necessary for their protection shall remain in the Government. The two provisions are absolutely distinct and are absolutely consistent.

"The title and control of the reservoirs themselves and the works incident to their maintenance, namely, the dam and headgates, remain in the General Government precisely the same as the ownership of a navigabe lake or a river remains in the public, but the canals and the lateral ditches by which the water is diverted and applied to the land are under the control, ownership, and management of the users of the water just as the canals and ditches taken from a public lake or public river would be under their control, and no more confusion can result in the one case than has actually resulted in the other.

"But it is said, further, that the laws of the State or Territory relating to the control, appropriation, and use of the water are not to be interfered with, and this will result in still further confusion. The confusion is in the mind of the objector and not in the bill. No more confusion will result from the use of these waters under the local laws and regulations of the State than have resulted by the use of other waters or property.

> "The fact that the title to a lake is in the public, the title and ownership and control of the canals leading from it is in the proprietors of the water, and that the appropriation and use of the water is under the State law has never resulted in any sort of confusion. On the contrary, if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail. The full domination and complete ownership of a tract of land is in no manner injuriously affected, because its title must be acquired and disposed of and it must be occupied and held under and in accordance with the law of the State."

This language of Representative Sutherland is of peculiar importance in view of the subsequent history of court decisions involving the waters of the western states. Representative Sutherland subsequently became United States senator and then one of the justices of this court, and it was he who wrote the opinions in *Ickes* v. *Fox*, *California Oregon Power Company* v. *Beaver Portland Cement Company*, and *Brush* v. *Commissioner of Internal Revenue*. It is apparent that from the beginning of his service in Congress in 1901 to the end of his public career when he wrote the opinion in *Brush* v. *Commissioner of Internal Revenue*, Justice Sutherland adhered firmly to the principle that the waters of the running streams are *publici juris* subject to the sovereign control of the states and are not owned by any governmental body or individual, but that rights in the waters can be acquired pursuant to state laws.

The interpretation of Section 8 of the Reclamation Act given by Mr. Sutherland when a representative in Congress is borne out by the opinions of this court in later years. In *Nebraska* v. *Wyoming*, when this case

was heard on demurrer, the court said (295 U. S. 40 at 43, 79 L. Ed. 1289 at 1291):

> "The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party."

In *Ickes* v. *Fox*, 300 U. S. 82, 81 L. Ed. 525, the court was likewise interpreting the Reclamation Act. It was a suit brought against the Secretary of the Interior in relation to his duties under the Reclamation Act. Because of its importance and because the decision is directly contrary to the various theories asserted by counsel for the United States, they go to great lengths in an attempt to escape from its effect. It is asserted that the decision on the points of interest is dictum, since the sole question before the court is whether the United States was an indispensable party. However, in order to decide that question, it was necessary for the court to decide the very question here at issue, namely, what was the nature of the interest of the United States if any, in the waters of the river under the Reclamation Act? In deciding that the United States was not an indispensable party, the court of necessity decided that whatever its rights, the United States was not the owner of either

the water or the usufructuary rights in the water. The court said (300 U. S. 94 to 96, 81 L. Ed. 530 to 531):

> "Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. Compare Murphy v. Kerr, (D. C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (ibid.), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands *and the water-rights* appurtenant thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the land owner.
>
> "The Federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of (March 3) 1877 (chap. 107, 19 Stat. at L. 377, 43 U. S. C. A. Sec. 321), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navgiable waters were reserved for the use of the public under the laws of the various arid-land states. California Power Co. v. Beaver

Portland Cement Co., 295 U. S. 142, 162, 79 L. Ed. 1356, 1363, 55 S. Ct. 725. And in those states, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied."

2. Contemporary and Subsequent Administrative Construction.

It is, of course, elementary that administrative construction, either contemporary or continued for a substantial period of years, is of great weight in determining the meaning of a law. The actions of the Department of the Interior in carrying out the terms of the Reclamation Act are of the greatest importance.

In order to administer the act, a division of the United States Geological Survey was created, known as the Reclamation Service. The reports of the Reclamation Service officially issued, under the authority of the Secretary of the Interior, furnish clear proof of what was done. Incidentally, these records are a complete answer to the contention of counsel for the United States that the reservation of lands created reservation of water. This is particularly argued on pages 94 to 97, and 227 to 231 of the brief, and the contention is made that Congress authorized the withdrawal of water.

In point of fact, the only authority for the withdrawal of such lands is for two purposes: (1) the withdrawal of such lands as are needed for rights of way, structures,

reservoir sites, etc., and (2) the withdrawal of irrigable lands in order to prevent speculative homestead filings and to preserve the lands for entry under the Reclamation Act after construction on the project shall have progressed to the point where such entries could be made. In the first annual report of the United States Reclamation Service, on page 15, it is stated, "one of the first acts required by law is the temporary withdrawal of lands which are to be reclaimed in order to prevent speculative filings upon them pending their examination."

On September 5, 1903, the Secretary of the Interior rendered a decision with reference to the powers of the department as to withdrawal of lands. This is reported in 32 L. D. 254, and a copy is placed in this brief as a part of the Appendix. It is quoted on page 33 and again on pages 35 to 36 of the third annual report, and again on page 24 and on page 27 of the fourth annual report of the Reclamation Service. The summary of the decision there given is as follows: "there is no authority to make such effective withdrawals of public lands in a state as will reserve the waters of a stream flowing over the same from appropriation under the laws of the state or will in any manner interfere with its laws relating to the control, appropriation, use of distribution of water."

The early recognition of the authority of the state to control the waters and of the state legislation as governing in its use and distribution is found in the second annual report, where, on page 36, it is stated that on March 20, 1903, the Secretary of the Interior authorized the director of the United States Geological Sur-

vey to designate suitable persons to sign notice of water appropriations, for the projects of the Reclamation Service in the name and on behalf of the Reclamation Service in pursuance of the provisions of Section 8 of the Reclamation Act.

From time to time, the engineers of the Reclamation Service held conferences to discuss and agree upon the procedure to be followed in carrying out the terms of the Reclamation Act. The first conference was held at Ogden, Utah, September 15 to 18, 1903, and the proceedings were published as, "Water Supply and Irrigation Paper No. 93 of the United States Geological Survey." On pages 232 to 237, Mr. Maurice Bien, one of the Reclamation engineers, who was also a law school graduate, discussed the relation between federal and state laws, and pointed out that the control of the federal government over the public lands and the non-navigable waters is that of a proprietor. A quotation is made from the message of President Roosevelt of December, 1901, indicating that as one of the sources or means of interpreting the Reclamation Act.

The report of the second annual conference of engineers, held at El Paso, Texas, in November, 1904, and adjourned to Washington in January, 1905, is published as Water Supply and Irrigation Paper No. 146 of the United States Geological Survey. Appearing on pages 222 to 225 is the official circular of the Reclamation Service, directing the manner in which applications for water are to be filed in the various states. Specific directions are given to engineers having that matter in charge that they must comply with the provisions of the laws of the respective states. The various state laws

are described and summarized, and the procedure definitely prescribed. There is no indication that the United States has the power or intended to exercise or claim any power to reserve the waters otherwise than by initiating appropriations under the terms and provisions of the state laws.

In the fourth annual report of the Reclamation Service, among the decisions of the Secretary of the Interior on page 29 of the report, is a summary of the decision of February 9, 1904. It is there stated, "as a rule ceded Indian lands are subject to disposition under certain specific acts mentioned in treaty or act of Congress providing for the cession, and hence, would not be subject to withdrawal under the provisions of the Reclamation Act. Specific decisions will be made on each case."

D.

SUBSEQUENT LEGISLATION.

The principal subsequent legislation is the Warren Act, the Act of February 21, 1911, 36 Stat. 925; U. S. C. A. Title 43, Sections 523, 524 and 525. It is elementary that an act of Congress may be construed in the light of subsequent legislation. (See *Gutierres* v. *Albuquerque Land and Irrig. Co.*, 188 U. S. 545, 47 L. Ed. 588.) The Warren Act of 1911 clearly shows that Congress did not consider that it had power or authority over the waters of the non-navigable streams sufficient to justify any action which would purport to sell or dispose of the water.

In the Appendix, attached hereto, we give a summary of the legislative history of the Warren Act, together

with extracts from the congressional debates showing conclusively that this was the attitude of Congress. Where the first version of the bill provided for the sale of the water, in the final form, the provision was that the United States would impound and store the waters, thus clearly recognizing that the rights were owned by the individual water users and were not subject to disposition by the United States. We particularly call the attention of the court to the repeated statements made showing this to be the congressional intention.

Thus, the Warren Act, instead of supporting the views of counsel for the United States, actually proves the contrary, and if we construe the Act of 1902 in the light of this amendatory act, we believe there can be no question but that Nebraska's contentions should be sustained.

E.

THE INTERPRETATION BY COUNSEL FOR THE UNITED STATES OF THE FEDERAL LEGISLATION.

The fundamental fallacy into which counsel for the United States have fallen is the apparent assumption that the states are contending that the federal legislation constitutes a "grant" or "dedication" of the waters to the respective states. While we cannot speak for Colorado or Wyoming, we believe that their contentions will not be substantially inconsistent with those of the State of Nebraska.

We do not contend that any of this legislation constitutes a grant or conveyance of the waters to the re-

spective states or even to the individual landowners. Moreover, we do not contend that it constituted a dedication of property which the United States held in a proprietary capacity, to the public or for public use. Any such contention would be directly contrary to the repeated decisions of this court, that the Act of 1866 and the subsequent legislation was "a recognition of a preexisting right." In order to support the theory which counsel for the government repeatedly set up and then attempt to knock down, it would be necessary to find in the legislation an attempt on the part of Congress to assert federal ownership of water or water rights, and this has at no point been found. On the contrary, the above analysis of the Reclamation Act and the history of its passage clearly shows the contrary intention, namely, that the ownership of rights in the flowing waters should be in individual landowners subject to state laws.

Ignoring the repeated decisions of this court as to the federal legislation being "a recognition of a preexisting right" counsel, on pages 89 to 91 of the brief, quote many decisions of state and federal courts asserting that these decisions "either announce or assume that rights to divert non-navigable waters in the public domain states are acquired not from the states but from the United States."

Some of these decisions do afford the interpretation which counsel makes. Such an interpretation is, of course, inadmissible under the decisions of this court. They are not, however, "the great majority of state and lower federal court decisions" as stated by counsel. Even of those cited on pages 90 to 91, the majority do not

bear out the inference drawn by counsel, and many of them are expressly contrary to counsel's theory. For example, *United States* v. *Conrad Investment Company*, (C. C. Montana) 156 Fed. 123, was carried to the Circuit Court of Appeals (161 Fed. 829). It involved Indian lands rather than any of the legislation herein involved. The Circuit Court of Appeals affirmed the lower court decision but did not approve the language of the lower court implying a grant from the United States. On the contrary, the court referred to the rights in waters as being the property of the Indians.

Crawford Company v. *Hathaway*, 67 Neb. 325, pages 356, 357 and 363, is cited, page 90 (93 N. W. 781, 791, 792, 794). The language actually used by the Nebraska Supreme Court is as follows:

> "Valid vested rights have also been acquired by reason of the prior appropriation of the public waters of the state which have received sanction and recognition by the legislature and by the Congress of the United States, which place the title of the appropriator on an equality with riparian owners. The fundamental hypothesis of prior appropriation of water for the development of the arid or semi-arid portions of the country, is the recognition of the right of the people or those desiring, to appropriate, and apply to beneficial uses any unemployed water of the natural streams, and that such rights, when so acquired, are to be determined according to the date of appropriation; priority of acquisition giving the better right" (67 Neb. 356 to 357, 93 N. W. 791).

The court further said in the opinion (67 Neb. 363, 93 N. W. 794):

> "Congress had authorized and sanctioned the appropriation of water for the purposes contemplated

by the legislative act. It had declared by the act of 1866 that in the disposition of the public domain riparian proprietors took title to their lands subject to the rights of appropriators who had acquired title to the use of water by appropriation for agricultural purposes, where such rights were recognized by local customs, by the legislature or by the courts. Practically all the lands in the semi-arid portions of the state at the time belonged to the government. It was the riparian proprietor, and it authorized the appropriation and diversion of the water for agriculture, mining and manufacturing purposes. The state recognized and encouraged the appropriation of water for agricultural purposes by the passage of the act of 1877. There were no riparian proprietors except the general government, or at most but a few, who were or could be affected by the act. It contemplated the appropriation of the waters of the streams and their use for irrigation to meet the necessities of the case in conformity with the customs and usages prevailing in arid portions of the western country, where irrigation was essential to agriculture. The Congressional Act of 1866 authorized this to be done, and land thereafter disposed of by the United States was subject to prior rights acquired by appropriation. The act of 1889 (Session Laws, 1889, ch. 68, p. 503), in which was merged the act of 1877, especially recognized the rights acquired by prior appropriators and treated them as it would any other vested property rights."

The Nebraska theory is more clearly stated in *Rasmussen* v. *Blust*, (1909) 85 Neb. 198, at page 203, 122 N. W. 862, at pages 863 to 864. There the court was specifically discussing the Act of 1866. After quoting the language of that act and the Act of 1870, the court goes on to say:

> "In Broder v. Water Co., 101 U. S. 274, it was held that the last cited statute merely acknowledges pre-existing rights, and that the owners of a ditch located on public land and in actual use will be protected against subsequent entrymen. The federal government does not by said act grant any estate, but merely recognizes such vested and accrued rights as 'are recognized and acknowledged by the local customs, laws and the decisions of courts.' If the appropriator is first in time with reference to possession and use as compared with the date a homestead entry is made upon the real estate, the rights of the homesteader are junior and inferior. Brosnan v. Harris, 39 Or. 148; Smith v. Hawkins, 110 Cal. 122; Maffet v. Quine, 93 Fed. 347, 95 Fed. 199. The irrigator will be protected in his possession and application of the water so long as he conforms to the local law regulating his rights, but he has no contract with or grant from the government, federal or state, with respect to his privileges. Mohl v. Lamar Canal Co., 128 Fed. 776."

It is interesting to note that the court clearly distinguishes the Act of 1866 relating to water, which was a recognition of a pre-existing right, from the Act of 1891 relating to rights-of-way across public lands, which is held to constitute a grant rather than to be a recognition of pre-existing rights.

Of particular interest is the case of *Mohr* v. *Lamar Canal Company,* 128 Fed. 776, cited by the Nebraska Supreme Court in *Rasmussen* v. *Blust,* quoted supra, pages 7 to 8.

Burley v. *United States,* (C. C. A. 9) 179 Fed. 1, obviously has no bearing on the instant case since the sole question involved was the power of the United

States to construct an irrigation project which would irrigate privately owned lands as well as publicly owned lands.

Howell v. *Johnson*, 89 Fed. 556; *Cruse* v. *McCauley*, 96 Fed. 369, and *Morris* v. *Bean*, 123 Fed. 618, were all decided by Judge Knowles, federal judge in Montana. It is very clear that he had misinterpreted the earlier cases under the Act of 1866 such as *Broder* v. *Water Co.*, 101 U. S. 274, 25 L. Ed. 790, which had held that the Act of 1866 was a recognition of the pre-existing right. The last of his decisions on this point seems to have been *Morris* v. *Bean*, 123 Fed. 618, and it is interesting to note the subsequent history of that case. His decision quoted in 123 Fed. 618 was on the question of the issuance of a preliminary injunction. The opinion of District Judge Whitson on the merits is reported in 146 Fed. 423. Incidentally, it is to be noted that this was a later phase of the litigation involving Sage Creek and, substantially, was the final conclusion of the litigation involved in *Howell* v. *Johnson*, 89 Fed. 556, including as it did one of the parties to the former case, Mr. Howell, plaintiff in *Howell* v. *Johnson*, who intervened in *Morris* v. *Bean*.

Judge Whitson, so far from agreeing with District Judge Knowles, used the following language in discussing the effect of the federal legislation:

> "An appropriation of water consists in the taking or diversion of it, and its application to some beneficial purpose. 'Appropriation' is a much abused word. It is often loosely spoken of as the preliminary step—such as filing a notice, making a claim to the water, or the like—but in its legal significance is embodied not only the claim to the water, but the

consummation of that claim by actual use. Long before the enactment of any statute in the arid states or territories, the custom of taking water had ripened into the right to use it. Jennison v. Kirk, 98 U. S. 456, 25 L. Ed. 240; Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414; Basey et al. v. Gallagher, 20 Wall. 670, 22 L. Ed. 452; Broder v. Water Company, 101 U. S. 274, 25 L. Ed. 790. After the custom had been fully established, statutes were enacted for the purpose of protecting appropriators by furnishing a public record, thereby avoiding disputes over priorities."

On appeal in the Circuit Court of Appeals Judge Whitson's decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit under the name of *Bean* v. *Morris*, 159 Fed. 651. No reference there is made to the federal legislation.

The Circuit Court of Appeals decision was again affirmed by the United States Supreme Court, 221 U. S. 485, 55 L. Ed. 821, opinion by Mr. Justice Holmes. His language is as follows:

"So we pass at once to the question of private water rights as between users in different states.

"We know no reason to doubt, and we assume, that, subject to such rights as the lower state might be decided by this court, to have, and to vested private rights, if any, protected by the Constitution, the state of Montana has full legislative power over Sage Creek while it flows within that state. Kansas v. Colorado, 206 U. S. 46, 93-95, 51 L. Ed. 956, 973, 974, 27 Sup. Ct. Rep. 655. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements, or such private rights and obligations as are in dispute, across their com-

mon boundary line. Missouri v. Illinois, 200 U. S. 496, 521, 50 L. Ed. 572, 579, 26 Sup. Ct. Rep. 268; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 260, 54 L. Ed. 1032, 1037, 31 Sup. Ct. Rep. 11."

It is noteworthy that Mr. Justice Holmes lays down the rule that the respective states have "full legislative power" over the non-navigable streams flowing within their borders. Except so far as necessary to protect the proprietary rights of the United States as the owner of lands susceptible to irrigation from such non-navigable streams, the federal legislation is clearly considered to be immaterial.

In *Anderson* v. *Bassman*, 140 Fed. 14, also cited by counsel for the United States, on page 90 of their brief, it is evident that the court was misled by District Judge Knowles' decision in *Morris* v. *Bean*, 123 Fed. 618. The distinction which was attempted between state control of navigable and non-navigable streams, as asserted both in *Morris* v. *Bean*, 123 Fed. 618, and *Anderson* v. *Bassman*, 140 Fed. 14, is clearly overruled by Mr. Justice Holmes' decision in *Bean* v. *Morris*, 221 U. S. 486, 55 L. Ed. 821, wherein he clearly lays down the rule that the states have full legislative power over the non-navigable streams while flowing within the states.

Winters v. *The United States*, 143 Fed. 740, and 207 U. S. 564, 52 L. Ed. 340, will be discussed hereinafter, since it relates to Indian lands and, therefore, comes within an entirely different category from the questions involved herein. As held in *Winters* v. *United States*, 207 U. S. 564, 52 L. Ed. 340, the title to Indian lands is held in fee by the United States, the Indians having a right of occupancy (see also *Johnson* v. *McIntosh*, 8

Wheaton 543, 5 L. Ed. 681; *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. Ed. 440).

It is unnecessary to discuss the decisions of other states, cited on pages 90 to 91 of the brief for the United States. Some of those decisions, like the Nebraska decisions above mentioned, are carelessly cited and do not bear out the interpretation given to them by counsel for the United States. Others are based upon a misunderstanding of the United States Supreme Court decisions or in ignorance of them. Certainly, they cannot prevail over the interpretation made by this court of the Act of 1866, and where they imply that that act was a grant rather than a recognition of a pre-existing right, that must be held to be erroneous and overruled by the repeated decisions of this court.

Counsel make much, on pages 68 and 140 of their brief, of the Act of 1906 relating to the Black Hills Forest Reserve (U. S. C. A., Title 16, Sections 506 to 508). However, a reading of this act makes it clear that Congress was merely exercising its undoubted right to protect water in relation to the public lands susceptible to irrigation. This right had been recognized several years earlier in *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 43 L. Ed. 1136. The act relates to agricultural lands which may lie within the boundaries of national forests and permits the homestead entry of such agricultural lands without interfering with the continued government ownership and control of the forest lands. In most of the states wherein the forest reserves are located, the rule of appropriation rather than riparian rights had been adopted. South Dakota was an exception. In protecting the government

ownership of those lands not opened to homestead and in protecting the water rights which might be useful in connection with those lands, the Congress attempted to legislate so that those lands when they passed to individual ownership would not carry with them riparian rights whose existence might interfere with development of irrigation by appropriation for the benefit of government lands.

The matter of these Black Hills lands did not, of course, have any bearing upon North Platte problems, but if the legislation is cited as indicating congressional intention to control state legislation beyond the limits laid down in *United States* v. *Rio Grande Dam and Irrigation Company*, it obviously has no such effect.

In connection with the Reclamation Act, counsel for the United States attempt to argue that Congress asserted rights of the United States in Section 8. The particular language upon which this argument is based is, "and nothing herein shall in any way affect any right of any state or of the federal government or of any landowner, appropriator or user of water in, to or from any interstate stream or the waters thereof."

In *Wyoming* v. *Colorado*, 259 U. S. 419, at page 463, 66 L. Ed. 999, at page 1013, this court made the following explanation as to the purpose and effect of this language:

> "The words which we have italicized constitute the only instance, so far as we are advised, in which the legislation of Congress relating to the appropriation of water in the arid land region has contained any distinct mention of interstate streams. The explanation of this exceptional mention is to be

found in the pendency in this court at that time of the case of Kansas v. Colorado, wherein the relative rights of the two states, the United States, certain Kansas riparians and certain Colorado appropriators and users in and to the waters of the Arkansas river, an interstate stream, were thought to be involved. Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation should be left to judicial determination unaffected by the act,—in other words, that the matter be left just as it was before. The words aptly reflect that purpose."

Thus this language is not any assertion of any right but is an expression of the intention of Congress not to disturb the existing relationship, whatever the courts might ultimately decide that relationship to be. It certainly cannot support any such contention as that made by counsel for the United States.

Emphasis is placed also upon the language, "the right to the use of water acquired under this act" (discussed on page 102 of the brief). It is argued that if the right to use of water is to be acquired under the act, it must be a right owned by the United States. Clearly, the word, "acquired," does not bear any such meaning. Neither the word nor the context indicates how or from whom the right is to be acquired. If the language had been, "conveyed" or "granted" or any word or words implying a *transfer* of a right then some inference might be drawn. The word "acquired" is wholly negative, however, as to the means of acquiring the right or the source of the right. It is our contention that the word relates rather to the acquisition of a right by appropriation under state laws. The right need not have been in existence before it is acquired by the individual user. In

fact under the law of appropriation, a new right comes into existence by the cooperation of the state law and the actions of the appropriator. The state law confers upon the individual water user the right to continued use of the water when he has once put it to beneficial use. It is a right that comes into existence through the actions of the water user when the state law authorizes and sanctions the existence of the right. In some states such a right is the subject of a transfer independently of the land on which the water is used. In others it can only be transferred as appurtenant to the land. In either case, its first appearance is not by a transfer out of a reservoir of rights owned by the United States or the state of any other governmental agency. It may be extinguished through abandonment. It is born of the toil and labor of the first appropriator and dies of disuse. Congress intended no different theory than that which is the universal basis of irrigation law.

Counsel overlook the provisions of Section 6 of the Reclamation Act (U. S. C. A., Title 43, Section 498) which provides for the transfer of operation and maintenance to the owners of the lands irrigated by the irrigation works. The record in this case shows that such transfer has actually been made in relation to the Pathfinder Irrigation District, the Gering-Fort Laramie Irrigation District, the Northport Irrigation District and the Goshen Irrigation District (see Neb. Exhibit 570; Neb. Exhibit 567; Neb. Exhibit 574; Wyo. Exhibit 11A). These provisions of the act and the transfers actually made under it obviously were for the purpose of carrying out the plan proposed by President Roosevelt in his message to Congress, cited supra. Taken in connection with Section 8 of the act, only one conclusion can be drawn,

and that is that the operation and maintenance are to be carried on under state laws. This is further demonstrated by the practical construction given to the act since, as the above exhibits show, the transfers were made to irrigation districts organized under the laws of the states respectively in which they operate.

This interpretation is further carried out by Section 5 of the Act of August 13, 1914 (U. S. C. A., Title 43, Section 499), Section 1 of the Act of May 15, 1922 (U. S. C. A., Title 43, Section 511), Section 4 of the Act of December 5, 1924 (U. S. C. A., Title 43, Section 500).

It is contended at various points in the brief of counsel for the United States that the Warren Act of 1911 (U. S. C. A., Title 43, Sections 523 and 524), constitutes an assertion of ownership by the United States in the waters. This is very clearly an erroneous construction of the Warren Act. (The legislative history quoted in the Appendix to this brief shows the care which was used in Congress to avoid any such interpretation.) Moreover, the language of the act clearly voids any theory of the sale of water. It refers to excess "storage or carrying capacity" and to contracts for the "impounding, storage and carriage of water." Contracts are authorized for the purpose of "impounding, delivering and carrying water for irrigation purposes." A specific provision is contained in Section 2 of the act (U. S. C. A., Title 43, Section 524) as follows:

> "*Provided*, that nothing contained in this or the preceding section shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State."

The other United States statutes to which attention is called relate to sale of right to use storage water. These provisions are, of course, based upon the practice followed in Nebraska and Wyoming and in most other irrigation states, whereby it is recognized that a storage appropriator who has gone to the expense of constructing storage facilities has certain rights in relation to the storage water. The storage facilities are constructed for the purpose of making available to irrigators, water which would otherwise run to waste. The owner of the storage reservoir must be permitted to recoup his expenditures by payments from the persons using the water. The congressional acts go no further than to recognize this and to authorize the Bureau of Reclamation to contract with water users and the irrigation districts representing them for the payment by such water users for the right to use the storage water.

F.

THE DECISIONS OF THIS COURT.

Recognizing, as they must, the inconsistency of their position with previous decisions of this court, counsel for the United States attempt to escape from their force and effect by various arguments. It is said that in some of these decisions the United States was not a party. Others of the decisions are discussed from the point of view that the language was dictum or that the court did not mean what it said.

Of course, the strict doctrine of *res judicata* does not bind the United States in cases where it is not a party. However, counsel cite many cases to which the State of Nebraska was not a party apparently expecting this

court to follow those cases as precedents. It seems obvious that the value of the decisions of this court is not particularly weakened because the United States did not formally make itself a party.

However, in *United States* v. *Rio Grande Dam and Irrigation Company,* 174 U. S. 690, 43 L. Ed. 1136, and in *Kansas* v. *Colorado,* 206 U. S. 46, 51 L. Ed. 956, the United States was a party. In *Wyoming* v. *Colorado,* 259 U. S. 419, 66 L. Ed. 999, the United States, while not formally a party, with leave of court filed a brief under date of December, 1917, signed by John W. Davis, solicitor general.

A somewhat different situation arises in connection with the cases as *Ickes* v. *Fox,* 300 U. S. 82, 81 L. Ed. 525. In that case the Secretary of the Interior, who is charged by the Reclamation Act with the duties of administering that law, was himself a party in his official capacity, and it was he who invoked the jurisdiction of this court. He was represented in the litigation by the Department of Justice and the views and the theories of the Attorney General of the United States were fully presented along much the same lines as they are being here presented. We do not contend that this constitutes technically res judicata or that the United States is bound by the decision in the same sense as if it had been a party. However, even if the United States had been formally a party, we would hardly be in a position to invoke the doctrine of res judicata, since the State of Nebraska was not a party.

We believe that as precedents these cases are controlling. For more than forty years this court has stead-

fastly and unwaveringly held that the sovereign legislative power of the states prevails over the flowing waters of the western states, and that the acts of Congress were based upon the principle that the control of the United States existed only, in relation to non-navigable waters, to the extent of assuring rights in those waters for the development of lands belonging to the public domain.

It is contended, on page 100 of the brief filed on behalf of the United States, that the opinion of the Supreme Court on demurrer in this case (*Nebraska* v. *Wyoming*, 295 U. S. 40, 79 L. Ed. 1289) should be disregarded because of the order permitting the United States to intervene, and counsel imply that the order of intervention in effect is a withdrawal of the language contained in the opinion on demurrer. We believe that the present counsel for the United States, who did not participate in the argument on the motion for leave to intervene, have overlooked what actually happened. We refer the court to the order permitting intervention found in 304 U. S. 545 to 546, 82 L. Ed. 1519, paragraph numbered 4 in that order, reading as follows:

> "4. This order shall be without prejudice to the determination on final decree of any of the substantive questions of law or fact advanced or to be advanced by any of the parties herein;"

As we construe this order, it permits the United States to assert its theories but neither expressly nor impliedly does it have the effect of withdrawing or overruling the opinion previously rendered as to the position of the United States in relation to the waters of the North Platte River.

III.

Matters In Relation To Navigable Waters.

Counsel for the United States have brought considerable confusion into the picture by their arguments in relation to navigable waters. The discussion, on pages 72 to 77 of the brief on behalf of the United States, does nothing to clarify the instant problem, but on the contrary seeks to make it more difficult. It is, of course, elementary that as to navigable streams the title to the beds passes to the states upon their admission to the union (*United States* v. *Utah*, 283 U. S. 64, 75 L. Ed. 844) and as to non-navigable streams, the title to the beds rest in the adjoining property owners (*Whitaker* v. *McBride*, 197 U. S. 510, 49 L. Ed. 857). The control of navigable waters is unquestionably under the sovereign power of the political authority controlling the area where the lands are located. While theoretically this means the state, the interstate commerce clause has been interpreted to give to the United States such control as is necessary to preserve navigability.

These considerations are elementary but they are, of course, immaterial in the present litigation. The United States is not here claiming any rights as the owner of any part of the bed under the North Platte River. In the argument, on page 73, counsel make much of the fact that the creation of the state does not invest it with *proprietary* rights in non-navigable waters and their beds. So far as Nebraska is concerned, we do not make any contention that the state has any such proprietary interest, either in the bed of the North Platte River or in the waters flowing therein (except so much as may be

necessary to assure water rights to lands owned by the state). Of course, as to any state-owned land, which is riparian to the stream, we claim the same ownership of the bed thereof as does the United States with reference to federally owned riparian land. These matters, of course, are immaterial with reference to the present litigation.

The real question is with reference to the sovereign powers of the state or the federal government respectively in relation to the waters of the non-navigable stream. Counsel's argument, on pages 72 to 77 of their brief, seems to be this: since the states have the sovereign power over navigable waters (subject to the interstate commerce clause of the United States Constitution) and the ownership of the beds of navigable streams, the United States must have the sovereign power over the waters of non-navigable streams and the ownership of their beds. This argument is, of course, absurd on the face of it, since obviously the conclusion does not follow from the premise.

The argument seems to be based upon the distinction existing in the English common law between navigable and non-navigable streams. According to the English common law, the Crown owned the beds of the navigable streams and had sovereign power over the waters. However, the control of the non-navigable waters did not rest in another sovereignty but rather the rule of riparian rights and *"aqua currit"* prevailed. This common law rule was properly adapted to the eastern states where the climate was humid and there was no demand or economic need for consumptive use of the waters of the streams such as exists in the western states where irrigation is economically important. It is this rule as

to riparian rights which is subject to the legislative powers of the states to change. This is and must be unquestioned under the decisions of this court in *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 43 L. Ed. 1136, and *Kansas* v. *Colorado*, 20 U. S. 46, 51 L. Ed. 956. It certainly does not follow, because the common law gave control of the waters of navigable streams to the sovereign and of non-navigable streams to the riparian owners, that when the state has changed the rule as to riparian rights the control of the non-navigable waters passes to the United States whether or not it is the owner of any riparian lands. On the contrary, as this court has many times held, the rule as to riparian rights is subject to legislative change by the sovereign (the state) and the state can provide for the creation of appropriative rights in the non-navigable streams subject only to the right of the United States to assure rights in waters for the benefit of the lands which it owns.

The only case cited by counsel for the United States in support of the theory that the sovereign power of the state exists only in relation to navigable streams and that the sovereign power of the United States exists in relation to non-navigable streams is the case of *Howell* v. *Johnson*, (C. C. Montana) 89 Fed. 556. We have discussed this case and the connected case of *Morris* v. *Bean*, 123 Fed. 618, 146 Fed. 423, supra, pages 54 to 56. It will be recalled that when this case reached the United States Supreme Court (*Bean* v. *Morris*, 221 U. S. 486, 55 L. Ed. 821) the opinion by Mr. Justice Holmes in effect overruled District Judge Knowles who wrote the opinion in *Howell* v. *Johnson*. Mr. Justice Holmes held that the respective states have full legislative powers

over the waters of the non-navigable streams while flowing within the state (subject, of course, to the correlative powers of other states through which a non-navigable interstate stream may flow and subject to an equitable distribution of the waters as between the states).

We submit that counsel's argument from the rules as to control of navigable streams is fallacious and that it is actually answered by the opinion of Mr. Justice Holmes in *Bean* v. *Morris*.

IV.

Matters Relating To Indian Lands.

The question of Indian lands, like that of navigable streams, is an immaterial and irrelevant matter which has been injected into this argument by counsel for the United States. Like the matter of navigability, it has no bearing upon the problems of the North Platte River, since the North Platte is conceded to be non-navigable, and no claim is made that any Indian lands are entitled to water from the North Platte River. The only question is whether the cases involving Indian lands, such as *Winters* v. *United States*, 207 U. S. 564, 52 L. Ed. 340, and *United States* v. *Walker River Irrigation District*, 104 Fed. (2d) 334, militate against the line of decisions giving the states sovereign and legislative powers over the waters of non-navigable streams.

At the risk of wearisome repetition, we again refer the court to the cardinal principles laid down in *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 43 L. Ed. 1136, and *Kansas* v. *Colorado*, 206 U. S. 46, 51 L. Ed. 956, to the effect that the powers

of the states are limited only by the power of the United States to protect navigability and by the power of the United States to assure water rights to lands to which it holds title. A reading of the cases involving Indian lands proves that those cases do not purport to detract from the fundamental principles above stated. In the first place, it must be remembered that the legal title to Indian lands rests in the United States, and that the Indians have merely the right of occupancy. The nature of the rights of the Indians depends upon the treaties made by the United States with the Indian tribes respectively. This was early held in the cases of *Johnson* v. *McIntosh*, 8 Wheaton 543, 5 L. Ed. 681, and *Beecher* v. *Wetherby*, 95 U. S. 517 at 525, 24 L. Ed. 440. The case of *Winters* v. *United States* must be considered in the light of the legal situation of those Indian lands. It involved an Indian reservation established by a treaty between the United States and the Indians under date of May 1, 1888. There are two opinions in the Circuit Court of Appeals for the Ninth Circuit and finally the appeal to the United States Supreme Court from the second opinion in the Circuit Court of Appeals. In the first opinion in the Circuit Court of Appeals (143 Fed. 740 at 747) the court said:

> "It is undoubtedly true, as claimed by appellants, that the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie. It was so held in Hardin v. Jordan, 140 U. S. 371, 384, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. See also Whitaker v. McBride, 197 U. S. 510, 512, 25 Sup. Ct. 530, 49 L. Ed. 857, and authorities there cited. It is also true, as appellants

claim, that the desert land acts upon which they rely recognize the doctrine of appropriation of water under state laws, but this right of appropriation, can only be acquired 'subject to existing rights.' The language of the proviso in the act of 1877 is:

"'That the right to the use of water by the person so conducting the same, on or to any tract of desert land * * * shall depend upon bona fide prior appropriation * * * necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.'

"The appropriations by appellants from the tributaries of Milk river were made with notice of, and subject to, the 'existing rights' of the government and of the Indians on the reservation. Kinney on Irrigation, Section 133."

This appeal was from an order granting a preliminary injunction and after its affirmance the case was tried on its merits in the Circuit Court for the District of Montana. On the merits, the case was again decided in favor of the rights of the United States as trustee for the Indians, and the opinion on appeal is reported in 148 Fed. 684. In substance this reaffirms the former opinion in 143 Fed. 740. This in turn was appealed to the United States Supreme Court where in the opinion, the court said (207 U. S. 577, 52 L. Ed. 346-347):

"The power of the government to reserve the waters and exempt them from appropriation under

> the state laws is not denied, and could not be. United States v. Rio Grande Dam & Irrig. Co., 174 U. S. 702, 43 L. Ed. 1141, 19 Sup. Ct. Rep. 770; United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste, —took from them the means of continuing their old habits, yet did not leave them the power to change to new ones."

Thus it appears that this case does not detract from or in any respect overrule *United States* v. *Rio Grande Dam and Irrigation Company*, but rather that it was based squarely upon that case. It does not justify any theory that the United States has the power to "reserve" waters independently on the land upon which they may be used, but on the contrary, it holds that the power of the United States to reserve land is the basis of a reservation of water and that where lands are reserved for certain purposes as to be held perpetually for the benefit of Indans under a treaty, there is also a reservation of such waters as may be necessary for the proper uses of that land. The case certainly has no bearing upon a situation where the United States is throwing open its land for settlement by white persons and expecting those lands to be held in individual ownership subject to the laws of the states where the lands are located. The case of *Winters* v. *The United States* is no support for any theory that the United States can control waters independently of lands which it owns, and where, in

fact, the lands on which the water is used belong in individual ownership.

The case of *United States* v. *Walker River Irrigation District*, 104 Fed. (2d) 334, is based upon *Winters* v. *United States*. It entirely supports our construction of that opinion. The court said (104 Fed. (2d) 336):

> "(b) The power of the Government to reserve the waters and thus exempt them from subsequent appropriation by others is beyond debate. Winters v. United States, supra, 207 U. S. page 577, 28 S. Ct. 207, 52 L. Ed. 340. The question is merely whether in this instance the power was exercised. If it was, the appellees are in no position to claim paramount rights in the stream, since their appropriations were all later than 1859.
>
> "It is of course well settled that private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U .S. 142, 55 S. Ct. 725, 79 L. Ed. 1356. The act of July 26, 1866, 14 Stat. 251, 253, was no more than a formal confirmation of local law and usage which had theretofore met with silent acquiescence on the part of the national government. Broder v. Natoma Water Co., 101 U. S. 274, 276, 25 L. Ed. 790; California Oregon Power Co. v. Beaver Portland Cement Co., supra, 295 U. S. pages 154, 155, 55 S. Ct. 725, 79 L. Ed. 1356. But it does not follow that the Government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes.
>
> "In United States v. Rio Grande Dam & Irrig. Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. Ed. 1136,

it was common law rule as to streams within its borders undoubtedly belongs in each state, yet two limitations must be recognized: first, that, in the absence of specific authority from Congress, a state cannot destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. The statement of these limitations has been many times repeated in later decisions, notably in California Oregon Power Co. v. Beaver Portland Cement Co., supra, 295 U. S. page 159, 55 S. Ct. 725, 79 L. Ed. 1356. In the Desert Land Act, Act of March 3, 1877, 19 Stat. 377, 43 U. S. C. A. Section 321 et seq., the dedication of non-navigable waters to the use of the public was expressly made subject to existing rights. And we need not consider the policy exemplified in the Reclamation Act of 1902, 32 Stat. 388, which directed the Reclamation Service to proceed in conformity with the state laws."

It is interesting to note that the basis given for the decision is *United States* v. *Rio Grande Dam and Irrigation Company* and, further, that the court so clearly distinguishes the reservation of lands for the Indians from the development of lands from the Reclamation Act, "which directed the Reclamation Service to proceed in conformity with the state laws." This is very far from supporting the contentions of the United States that it has the power and right to control the waters appropriated for use on private lands. The cases of *Winters* v. *United States* and *United States* v. *Walker River*

Irrigation District support the contention of the states that the waters of the North Platte and Platte Rivers are subject to the sovereign control of the states respectively, subject to an equitable distribution among them.

V.

The United States Theories of "Reservation" and "Appropriation."

A.

INTRODUCTORY.

The claim of the United States herein made is ultimately to control the waters of the irrigation districts whose appropriations were initiated by the United States independently of state laws and state administration. Nothing else is of importance in connection with the theories asserted by counsel for the United States, since the United States concedes state control of the irrigation projects senior and junior and intervening between the appropriations of these various districts. The legal theory of the United States is set forth in the two causes of action in the petition in intervention being, respectively, the theory of "reservation" and "appropriation." Obviously, these theories are inconsistent with each other in that proof of one would disprove the other. Counsel for each of the states have moved to require the United States to elect, but such motions have, of course, been left in abeyance because of the master's interpretation of his powers as set out in the order of appointment. We do not waive our motion to require an election, but since counsel for the United States have attempted to pursue both theories in their brief, it will be necessary for us, likewise, to answer them separately.

B.

THE THEORY OF RESERVATION.

As we understand this theory, it is based upon the principle that the United States was the owner of all the waters and that by analogy to the power of the United States to withdraw public lands from settlement, the United States had the power to withdraw the waters from appropriation and use. The fundamental error in principle (i. e. the claim that the United States owns the waters of the non-navigable streams), is, we believe, demonstrated by the foregoing portion of this brief. In support of the claim that the United States had the power to reserve these waters, only four cases are cited, three of which relate solely to Indian lands. These are *Winters* v. *United States,* 207 U. S. 564; *Conrad Investment Company* v. *United States,* 161 Fed. 829; and *United States* v. *Walker River Irrigation District,* 104 Fed. (2d) 334. These are, we believe, sufficiently discussed in the immediately preceding section of this brief and no further comment is necessary. They certainly do not support any theory that the United States can "reserve" water other than for use upon lands, the ownership of which is retained or reserved in the United States.

The only other case cited in support of this proposition is *Burley* v. *United States,* (C. C. A. 9) 179 Fed. 1, at pages 12 to 13. This case did not involve any question of water rights as between claimants upon a stream. It was a condemnation proceeding in which the property owner challenged the right of the United States to construct a reclamation project for the reason that its purpose was in part to irrigate privately owned land. The court stated the real question in the case as follows (179 Fed. page 8):

> "We come now to the consideration of the real question in this case, which is presented as a constitutional question and may be stated in the following terms: Can the United States, owning arid lands within a state, organize and maintain a scheme or project whereby it will associate with itself other owners of arid lands for the purpose of reclaiming and improving such lands, and in that behalf exercise the right of eminent domain against another landowner for the purpose of obtaining the title and possession of land absolutely necessary in carrying the proposed scheme or project into effect?"

The language, on pages 12 and 13 of 179 Fed., was not intended to deal with the rights as between the states and the United States nor with the question of appropriations made for private lands under state laws and the water rights assured to lands owned by the United States. That language certainly has nothing to do with the claim now made by the United States that it has always owned the water rights and that it has reserved some of them independently of lands owned by the United States.

Counsel's argument, on pages 106 to 112 of their brief, that the Reclamation Act authorized the reservation of waters and that the Secretary of the Interior did reserve waters, becomes still more tenuous. Certainly, no express language of the Reclamation Act in any way justifies a theory of reservation; on the contrary, as pointed out in *United States* v. *Walker River Irrigation District*, 104 Fed. (2d) 334, the language of the act contains a specific direction to the Secretary of the Interior to proceed in accordance with state laws. Counsel is driven to the general language authorizing the Secretary to perform any and all acts necessary for the purpose

of carrying into effect the provisions of the act. Counsel say that this, of course, means that the Secretary is to take the steps necessary to assure a water supply for the project and with this we agree. We cannot, however, agree that the requirement that he assure a water supply meant that he was to "reserve the waters." On the contrary, such a reservation, even if lawful and constitutional, would be a violation of the provisions of the act requiring him to proceed in accordance with state laws. When the two provisions are construed together, it is obvious that the Secretary was directed to do exactly what was done, namely, to take the necessary steps to initiate an appropriation under state laws. Counsel further argue, on pages 94 to 95 of their brief, that the preliminary withdrawal of lands amounted to their reservation and, therefore, an implied reservation of the water rights. In support of this theory, only the same three Indian land cases are cited, namely, *Winters* v. *United States,* 207 U. S. 564, 52 L. Ed. 340; *Conrad Investment Company* v. *United States,* 161 Fed. 829; and *United States* v. *Walker River Irrigation District,* 104 Fed. (2d) 334. There is, however, a clear distinction between the reservation of lands for the benefit of Indians under a treaty, and the temporary withdrawal of lands from settlement authorized by the Reclamation Act. In the case of Indian lands, they are permanently reserved with title in the United States and the right of occupancy and use for the Indians. The United States holds the title as trustee for the Indians and the United States controls the uses. Under the Reclamation Act, however, lands are only withdrawn for two purposes, first, for sites for canals, reservoirs, dams, power plants and other structures and, second, in order to prevent speculative homestead filings. The lands expected to be

irrigated are temporarily withdrawn from settlement and then opened for settlement under the Reclamation Act when the project has been developed so far that they can be reclaimed. In connection with the first class of withdrawals, obviously there could be no implied reservation of water rights (except perhaps in relation to power sites), since the waters are not used by the canals, reservoirs, dams and similar structures, but those structures are only for the purpose of making possible the use of the water on other lands. In connection with the temporary withdrawals to prevent speculative filings, there can be no implied reservation of waters since the withdrawal is only temporary and not a permanent reservation.

Counsel are finally driven to the argument, on pages 108 to 110, that the filings made in the name of the Secretary of the Interior constituted a reservation of the waters. It needs only a reference to the filings themselves to demonstrate that they did not constitute any attempt to "reserve" any waters. Some of these filings are in the record as exhibits, U. S. Exhibits 10, 11, 17, 18, 19, 23, 24, 25, 26, 35. These are the ordinary forms of application for appropriation of water as prescribed by the irrigation authorities of Nebraska and Wyoming and do not in any respect purport to "reserve" the waters. They ask the respective departments to issue permits and permits are actually issued. They recognize the state laws of appropriation as controlling and do not differ from similar applications made by privately owned companies or by irrigation districts. The fallacy of counsel's argument is demonstrated by the paragraph in the middle of page 108, wherein counsel state that by following the procedure established by state law for appropri-

ation of waters by private persons, the Secretary has effected the reservation or withdrawal of waters necessary for government use. This statement is self-contradictory if there is any meaning in the distinction asserted in the petition in intervention between the reservation and appropriation of waters. The application and permit are just what they purport to be. They do not pretend to be a recognition of a pre-existing right in the United States, but on the contrary, they constitute permission granted by the state to the Secretary of the Interior to proceed with the construction and to take the necessary steps to assist the settlers in bringing about a completed appropriation of waters for the lands described.

Thus it will be seen that no authority existed for any supposed reservation of waters; that no attempt was made to exercise any such authority; and that, obviously, neither the Secretary of the Interior nor any of the officers or agents of the Reclamation Bureau believed that they were reserving waters or intended to make any such reservation.

Even conceding ultimate origin of the water rights in the federal government, it seems plain that when they have finally reached the ownership of private owners, they are no more subject to federal control than are the farm lands of eastern Nebraska, title to which was once in the United States government, but which are now in private hands.

C.

THE THEORY OF APPROPRIATION.

Realizing, as they must, the weakness of their theory of reservation of water rights, counsel for the United

States have put forward an alternative and inconsistent theory that the United States has appropriated the waters and is thus the owner of an appropriation. This theory is put forward in the second cause of action and is discussed in the brief filed on behalf of the United States, commencing at page 142. Of course, the theory of an appropriation is inconsistent with the theory of ownership and reservation as a basic and fundamental right. No claim is made that the United States through any administrative authority or otherwise grants or administers appropriations of water and, obviously, if the United States has acquired an appropriation, this must be done through state laws which are based upon state as opposed to federal control. The theory that the United States has appropriated water cannot exist side by side with the theory that the United States as the owner of the water has reserved for itself certain of those waters. Since, however, the United States, regardless of inconsistency, has pleaded these rights and has argued them in the same brief, it is necessary for us to discuss both in our answer. We are fortunate, however, in that our position in answer to both is thoroughly consistent, and that we do not need to devote some of the pages of this brief to an argument that the water was reserved and additional pages to the argument that it was not reserved but it was rather appropriated.

Since the only questions before the court involve the waters of the North Platte and Platte Rivers, and since the United States claims appropriative rights in those waters, only in the states of Wyoming and Nebraska, it is unnecessary for us to go farther afield than to discuss the water laws of those two states in order to determine whether the United States itself has appropriative rights

in the waters and, if so, what is their nature. The United States has not operated in the State of Colorado on the North Platte River and for the purposes of this litigation, the rights of the United States to Colorado waters, if any, are not involved. The appropriative rights, if any, depend upon the laws of the states and, therefore, what rights the United States might be able to acquire by appropriation in Idaho, Montana, Nevada, etc., have no bearing on the problems involved in the case now before the court. Fortunately, in Nebraska and Wyoming, water rights are governed by basic statutes which are substantially the same. The Nebraska irrigation law of 1895 was copied from the previously enacted Wyoming statute, and while there are changes in detail, both in the adoption of the 1895 act and in subsequent amendments, the water laws of the states still remain substantially the same.

At the outset of this discussion, we must distinguish an appropriation of direct flow for irrigation under the laws of the States of Nebraska and Wyoming from storage rights as recognized by those laws. Under the Nebraska laws, as well as the Wyoming laws, a separate type of permit is required for a reservoir or storage, and a secondary permit for application of waters to beneficial use must be applied for and issued (Compiled Statutes Nebraska, 1929, Section 46-617, Revised Statutes Nebraska, 1943, Section 46-241, Wyoming Revised Statutes, 1931, Sections 122-1501 to 1510 and 122-1601 to 1607). It is especially noteworthy that under Wyoming Revised Statutes, 1931, Section 122-1508, specific authority is given for the owner of the reservoir to grant the use of waters stored in the reservoirs "under such terms as shall be agreed upon by and between the parties in in-

terest." While the terms upon which the reservoir owner is to be compensated are the subject of agreement, a secondary appropriation is made, owned by the landowner, and his right is adjudicated to him directly (see infra, p. 92). In the immediately following discussion, we refer only to appropriations for rights to the direct flow or natural flow and leave for a later point in the brief discussion as to rights acquired under a storage appropriation or storage permit.

1. THE UNITED STATES HAS NEVER ACQUIRED ANY PERFECTED APPROPRIATION FOR NATURAL FLOW RIGHTS ON THE NORTH PLATTE RIVER.

In the brief filed on behalf of the United States, commencing at page 142, it is asserted that the United States has become the owner of the natural flow appropriative rights which have come into existence in connection with reclamation projects on the North Platte River, such as irrigation rights under the Pathfinder Irrigation District. With this, of course, we take issue, and it is perhaps sufficient to cite only the case of *Ickes* v. *Fox*, 300 U. S. 82, 81 L. Ed. 525 (see quotation supra, pp. 44-45).

Since, however, counsel for the United States have challenged the authority of *Ickes* v. *Fox* and have asked the master and this court to overrule it, it is perhaps of some importance to go into the fundamental reasoning and basis back of the decision.

It is to be noted that Judge Sutherland refers to *Murphy* v. *Kerr*, 296 Fed. 536, at pages 544 and 545. The opinion in that case was written by Honorable Orie L. Phillips, who is now one of the judges of the Circuit Court of Appeals for the Tenth Circuit and is one of our

leading authorities on matters of irrigation law. In that opinion, Judge Phillips used the following language:

> "The property right in the water right or usufructuary right is separate and distinct from the property right in the ditch, canal, or other works constructed to divert, conduct or store the same. Kinney in his work on Irrigation and Water Rights, Vol. 2, 2d Ed., Section 764, says:
>
> " 'A water right is a species of property in and of itself, and exists separate and independent of the right to the ditch, canal, reservoir, or other works constructed to divert, conduct, or store the water. This is so although they may be all owned by the same person; and again the water right may be owned by one person and the ditch or other works by another. A valid water right, although intimately related to and connected with the dam and canal, is a different thing, and that, too, although each is necessary to make the other available and useful. They are each capable of several and distinct injuries, giving rise to separate and distinct causes of action for which there are separate and distinct remedies. As was said in an early California case: "The dam and canal may be trespassed upon, broken down, destroyed, or taken into possession under a claim of right, without taking away the water, or preventing its use in any other mode or place, or without questioning the plaintiff's right to it, and the plaintiff may have his cause of action for the trespass, or to recover possession of the land constituting the dam and canal, or their site; and the water may also be diverted and taken away without in any way disturbing or interfering with the dam and canal. Ownership of a ditch and the water right for the waters to flow through the ditch may, and often do, exist in different parties. The existence of the one right does not necessarily imply the existence of the other right in the same party." '

"See, also Snow v. Abalos, 18 N. M. 681, 140 Pac. 1044; Wiel on Water Rights in Western States, Vol. 1, Section 456, p. 482; Nevada, etc. Co. v. Kidd, 37 Cal. 282; Swank v. Sweetwater Irrigation & Power Co., 15 Idaho, 333, 98 Pac. 297.

"In the larger systems it has been the practice for an irrigation company to construct diversion dams, canals, ditches, reservoirs, and other physical works for the irrigation of bodies of land, and to sell the land to be irrigated to farmers and to enter into contracts with the purchasers thereof to maintain the physical works, and to divert, store and deliver, or where storage is not used to divert and deliver to the owner of the water right at the land, the water for beneficial use thereon. The property right in the irrigation works is in the irrigation company, and the water right is appurtenant to the land and belongs to the owner thereof. In other cases the owners of the lands supplied by an irrigation system organize a ditch company in which the stock is owned by the water users. The title to the irrigation works is in the ditch company. It contracts with the landowners to divert, store and carry water as above to their lands for beneficial use thereon. Under such an arrangement also the water right is appurtenant to the land and belongs to the owner thereof, while the property right in the irrigation works is in the ditch company.

"The owner of the irrigation works then becomes an intermediary agent of the owner of the land and water right and diverts and carries the water from the natural stream to the land. It is the carrier of the water. Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N. M. 177, 251, 61 Pac. 357; Snow v. Abalos, 18 N. M. 681, 696, 140 Pac. 1044; San Joaquin & King's River C. & I. Co. v. Stanislaus County, (C. C.) 191 Fed. 875, 894, 895; Wyatt v. Larimer & Weld Irrigation Co., 18 Colo. 298, 33

Pac. 144; 36 Am. St. Rep. 280; Gould v. Maricopa, Canal Co., 8 Ariz. 429, 76 Pac. 598, 600; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487, 490, 491, 3 Am. St. Rep. 603; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286.

"In Wyatt v. Larimer, etc., supra, the Colorado court said:

" 'The decision by the court of appeals in this case was rendered by a divided court: We are unable to see wherein the discussion by the learned judge writing the majority opinion touching the constitutional status of irrigation companies in this state was essential to the decision of the questions involved in the case; but, inasmuch as the views expressed in that opinion are so at variance with numerous decisions of this court, we feel impelled to express our disapproval thereof, and our adherence to the doctrine heretofore announced by this court in relation to the status of canal companies organized for the purpose of carrying water for general purposes of irrigation. We adhere to the doctrine that such a canal company is not the proprietor of the water diverted by it, but that "it must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners." Wheeler v. Irrigation Co., 10 Colo. 582, 17 Pac. 487; Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313; Combs v. Ditch Co., 17 Colo. 146, 28 Pac. 966.'

"What interest, then, if any, has the owner of the land and the water right in the dams, reservoirs, canals, ditches and other physical works by which the water is diverted and carried to his land? Wiel in his work on Water Rights in Western States, Section 1339, Vol. 2, says:

" 'The water rights and an estate of ownership in the distributing system belong to the consuming public as property, and the canal company is only an agent to enable the consumers (the appropriators) to make beneficial use of their appropriations. This view of the status of the right of a consumer as being per se greater than one of service and as amounting to actual "water-right" ownership with an "easement in the ditch or canal" seems to be the rule in numerous jurisdictions.'

"This view is sustained by the following authorities: Henrici v. South Feather Land & Water Co., 177 Cal. 422, 170 Pac. 1135; Farmers' High Line Canal & Res. Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 Pac. 290; Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 307, 33 Pac. 144, 36 Am. St. Rep. 280; People ex rel. Standart v. Farmers' High Line Canal & Res. Co., 25 Colo. 202, 54 Pac. 626; Grand Valley Irrigation Co. v. Lesher, 28 Colo. 273, 65 Pac. 44; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 863, 15 L. R. A. (N. S.) 359; Dorris v. Sullivan, 90 Cal. 286, 27 Pac. 216; Edinburgh Irr. Co. v. Paschen, (Tex. Civ. App.), 223 S. W. 329; Mudge v. Hughes, (Tex. Civ. App.), 212 S. W. 819, 823; Bolles v. Pecos Irr. Co., 23 N. M. 32, 167 Pac. 280.

"In the case of Farmers' High Line, etc. Co. v. New Hampshire, etc., Co., supra, the Colorado court, at 92 Pac. 294, said:

" 'It hardly seems necessary to again state, as this court so often has stated, that the perpetual right to have water carried by a ditch constitutes an easement in the ditch. Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298-307, 33 Pac. 144, 36 Am. St. Rep. 280; People ex rel. Standart v. Farmers' High Line Canal & Res. Co., supra; Irrigation Co. v. Lesher, 28 Colo. 273, 65 Pac. 44. Such an easement is

real estate—a freehold estate. Wyatt v. Irri. Co., supra.'"

The basic principle is that the application and permit do not constitute an appropriation. The right is inchoate until the water is applied to beneficial use. When pursuant to the application and permit, the construction is completed, the water diverted and the land reclaimed by the application of the water, then a perfected appropriation comes into existence. It is not granted by the state in the sense of a transfer such as the grant made by the grantor in a deed where the conveyance transfers to the grantee all or a portion of the title held by the grantor. It is rather the creation of a new right analogous to that created when a patent right is issued for an invention. The United States government issues the patent right pursuant to patent laws. However, the United States did not own the patent before it was issued, and, in fact, that particular patent right did not exist. A new right has come into existence by the cooperative effect of the skill, industry and invention of the inventor, together with the United States patent laws. In the same way, an appropriation comes into existence as a newly created right resulting from the cooperation of the state laws together with the skill, industry and expenditure of money, of the persons participating in completing the various steps of the appropriation.

The steps taken by the United States in connection with appropriations under the Reclamation Act are not in themselves sufficient to constitute an appropriation. This court said in *Arizona* v. *California*, 283 U. S. 423 at 459, 75 L. Ed. 1154 at 1168:

"To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations."

In *Murphy* v. *Kerr*, 296 Fed. 536 at 542, cited above, and cited by the United States Supreme Court in *Ickes* v. *Fox*, supra, Judge Phillips used the following language:

"The water right or usufructuary right is acquired by perfecting an appropriation. An appropriation has been defined as follows:

" 'The rule is settled in this state that to constitute a valid appropriation of water there must be (1) an intent to apply it to some beneficial use, existing at the time or contemplated in the future; (2) a diversion thereof from a natural stream; and (3) an application of it within a reasonable time to some useful industry. Beers v. Sharpe, 44 Or. 386, 75 Pac. 717, citing Simmons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727; Hindman v. Rizor, 25 Or. 112, 27 Pac. 13; Low v. Rizor, 25 Or. 551, 37 Pac. 82; Nevada, etc., Co. v. Bennett, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777.'

" 'It seems the settled law in the states where irrigation problems have been dealt with that, in order to acquire a vested right in the use of water for such purposes from the public streams, three things must concur: There must be the construction of ditches or channels for carrying the water; the water must be diverted into the artificial channels, and carried through them to the place to be used; and it must be actually applied to beneficial uses,

and he has the best right who is first in time.' Gates v. Settlers' Co., 19 Okl. 83, 91 Pac. 856.

"'It has been repeatedly decided in this jurisdiction that an appropriation consists of an actual diversion of water from a natural stream, followed within a reasonable time thereafter by an application thereof to some beneficial use.' Windsor R. Co. v. Lake Supply Co., 44 Colo. 214, 98 Pac. 729.

"The latest definition of the term 'appropriation of water' under the arid region doctrine of appropriation by Kinney, in his work on Irrigation and Water Rights, (2d Ed.) Section 707, is as follows: 'The appropriation of water consists in the taking or diversion of it from some natural stream or other source of water supply, in accordance with law, with the intent to apply it to some beneficial use or purpose, and, consummated, within a reasonable time, by the actual application of all of the water to the use designed, or to some other useful purpose. Snow v. Abalos, 18 N. M. 681, 693, 140 Pac. 1044, 1048.

"'The doctrine of prior appropriation is the law governing water rights in this territory, and to constitute a valid prior appropriation of the water of the Rio Grande two things must be established:

"'"(1) There must be a rightful diversion. (2) An application to some beneficial use.' Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N. M. 177, 240, 61 Pac. 357, 361.'"

It is to be noted that the case of *Aubuquerque Land & Irrigation Company* v. *Gutierrez*, 10 N. M. 177, 61 Pac. 357, from which Judge Phillips made the above quotation, was affirmed by the United States Supreme Court under the name *Gutierrez* v. *Albuquerque Land & Irrigation Co.*, 188 U. S. 545, 45 L. Ed. 588.

In *Hewitt* v. *Story,* (C. C. A. 9) 64 Fed. 510, at pages 514 to 515, there is a complete discussion of the essential features of an appropriation. The court there said:

> "The diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use;"

In *Oscarson* v. *Norton,* (C. C. A. 3) 39 Fed. (2d) 610, the court said at page 613:

> "Indeed, appellants' claim defeats itself. Water can be appropriated only for a beneficial use and until it is so used the appropriation is incomplete. True, this inchoate right may not be defeated by an intervening appropriation so long as the holder thereof, after the construction of his diversion works, exercises due diligence in making such application of the water; but it still remains true that to perfect the right, actual use is indispensable. If the water covered by this 'appropriation,' was never used upon these lands and did not become appurtenant thereto, the appropriation itself has failed."

The same rule prevails in Nebraska. In *Commonwealth Power Company* v. *State Board of Irrigation,* 94 Neb. 613 at page 616, 143 N. W. 437 at 938, the court said:

> "Used in its strictest sense under such a statute the word 'appropriation,' denotes an appropriation which has been legally initiated by the filing of an application for a permit with the state board, the granting of a permit by that body, the construction of the works as specified therein, and the application of the water to a beneficial use within the time limited in the permit or subsequent extensions. The initial step is the application for the permit. Its issuance gives the applicant a contingent or condi-

tional right which becomes a final and complete appropriation only when the works are completed and the waters beneficially used."

In *Kersenbrock* v. *Boyes,* 95 Neb. 407, the court again held that application to beneficial use was necessary before a permit would ripen into a perfected appropriation.

It was never contemplated by the Reclamation Act that the United States would itself apply water to beneficial use under a reclamation project. The plan of the Reclamation Act was unquestionably that the United States would make the application for permit, and would construct the works including the canals as well as the diversion works, thus making it possible for the landowners to get the water and make use of it. The final step, however, in perfecting the appropriation was to be left to the individual landowners who would apply the water to beneficial use and reclaim the land. This applies equally whether the land was held in private ownership at the inception of the project or was a part of the public domain to be conveyed to the settler upon his compliance with the provisions of the Reclamation Act. In either case, it was never contemplated that the United States would itself till the soil and irrigate the land. It was at all times contemplated that the functions of the Bureau of Reclamation or of the United States government would end when the water was delivered to the land; that is to say, it was never planned that the United States would be more than a carrier of water as stated in *Ickes* v. *Fox.*

This plan of operation is even more clearly demonstrated by the provisions of the Reclamation Act trans-

ferring the operation and maintenance of the works below the point of diversion to the landowners, organized into irrigation districts (Reclamation Act of June 17, 1902, Section 6, U. S. C. A., Title 43, Section 498). Such a transfer would be absurd if the United States were to be considered as the appropriator.

Finally, the adjudications of water rights, made at the instance of the authorized representatives of the Bureau of Reclamation, shows the intention that the water rights were considered and intended to belong to the landowners. We refer the court to Nebraska Exhibits 571, 572, 576, and Wyoming Exhibit 7, which show these adjudications made direct to the landowners.

2. The Nature of the Rights of the Water Users in the Canal and Structures.

It is argued in the brief filed on behalf of the United States, commencing on page 154, that a privately owned irrigation company owns the appropriations under which water is diverted into a canal. Counsel even goes so far as to say, commencing on page 162, that the water user has a mere right to receive the water and no further right. This is, of course, refuted by the quotation supra from *Murphy* v. *Kerr*, 296 Fed. 536. It is further refuted so far as concerns the State of Nebraska by the decisions of the Nebraska Supreme Court. It has many times been held that an irrigation company is a common carrier of water and must furnish water to appropriators whose land can be reached from the canal upon the payment of reasonable compensation to be fixed by the Nebraska Railway Commission, *McCook Irrigation and Water Power Company* v. *Burtless*, 98 Neb. 141; *Southside Irrigation Company* v. *Brooks*, 102 Neb. 57; *Lair* v.

South Side Irrigation Company, 130 Neb. 713. Early in the history of irrigation law in Nebraska (*Castle Rock Irrigation Company* v. *Jurisch*, 67 Neb. 377 at page 382), the court held that an irrigation company although privately owned was an agent of the state for the purpose of distribution of water.

In *Fenton* v. *Tri-State Land Company*, 89 Neb. 479 at 492, the Nebraska court held that a water user has an easement in the canal. It is interesting to note that this is exactly parallel to the decision of Judge Phillips in *Murphy* v. *Kerr*, 296 Fed. 536, and the quotation from Wiel on Water Rights is there quoted with approval.

Dundy County Irrigation Company v. *Morris*, 107 Neb. 64, cited by counsel for the United States, on page 162 of their brief, is not inconsistent with the other Nebraska cases, and on the contrary, simply bears out the principle above mentioned. It is an illustration of the carelessness with which counsel have piled up and cumulated a large number of citations in this section of their brief (for example, pp. 158, 162, 164, etc.). The Dundy County Irrigation Company case merely holds that the particular irrigator, not being a stockholder in the irrigation company, has a right to compel the irrigation company to carry water to his land for which an appropriation is made upon payment of a reasonable sum therefor.

The absurdity of counsel's claim that the irrigation company owns the appropriation is demonstrated by the real rights of one against the other. Admittedly, it is a breach of duty for the irrigation company to fail to

carry water to a landowner having an appropriation where he pays or tenders the proper charge. He can compel service to be furnished to him by mandamus or he can recover damages for failure to carry the water. The irrigation company has no such right against the landowner. The landowner can abandon the use of the water and thereby the appropriation will lapse by abandonment. If the landowner chooses so to let the appropriation lapse and thereby destroy it, the ditch company has no redress against him. Since in Nebraska the water right is inseparably appurtenant to the land (*Farmers Canal Company* v. *Frank*, 72 Neb. 136) the appropriation is completely destroyed when the landowner abandons it, and the ditch company has no right to transfer it to other land. Thus the ditch company's rights, if any, are completely at the mercy of the landowner. He may decide permanently to give up the use of ditch water diverted from the river and to substitute pump irrigation from wells. If he chooses to do so, the appropriation from the river is destroyed, and the ditch company has no redress against him. This situation effectively refutes any argument that the ditch company owns the appropriation. It is a peculiar sort of ownership which can be destroyed at the whim of another and without redress on the part of the owner.

The argument, on pages 156 to 158 of the brief filed on behalf of the United States, confuses the issue and does not aid in the enlightenment of court or counsel. It is true that courts recognize the right of the irrigation company as representative or trustee for the landowners to appear in court and assert as against outsiders the appropriative rights of the landowners served by the canal. This does not, however, mean that the water company

is the owner of the right. It has, of course, a financial interest which the courts will protect in that it is a common carrier defraying its expenses and recouping its investment by the payments made by the landowners for its services. If hostile and unlawful diversions diminish its water supply, its revenues will be decreased, and it can assert its rights. Ordinarily, the protection of those rights will also protect the rights of the water users and the expense of litigation is ordinarily passed on to the water users in the form of additional charges for the carriage of water. The citations from Idaho, Oregon and Washington (whether or not they support the text in reference to which they are cited) can have no bearing upon the water rights under the laws of Wyoming or Nebraska.

The Nebraska statute, cited on page 146 of the brief on behalf of the United States, Section 46-628, is important in the instant case only in relation to storage water. The authority given to the United States to contract, to rent or sell relates only "to developed, stored, flood or unused water" and then only in accordance with the Act of Congress which, as held in *Ickes* v. *Fox*, does not authorize the United States to be the owner of any such waters. Certainly this Nebraska statute does not authorize the United States to contract, to sell or rent or otherwise dispose of waters appropriated for lands under the Pathfinder or Gering-Fort Laramie or Northport Irrigation Districts. We understand the contention of the United States to be that the Secretary of the Interior has the power regardless of state law and regardless of the control of state administrative authorities, to take the waters away from the lands for which they were appropriated and to use those waters upon

other projects. Such powers are unquestionably not given by the statute, quoted on page 146, nor by the various sections of Nebraska statutes quoted on page 148 of the brief on behalf of the United States. The analysis of Colorado statutes, made on pages 150 to 152 of the brief on behalf of the United States, is wholly immaterial. The question in this case, on the theory of appropriation, is solely what rights were acquired by the United States in connection with the appropriations made on the North Platte River. Since none were made in Colorado, no Colorado state law could attach, and the question must be decided in accordance with the laws of the State of Wyoming or the State of Nebraska or both. The same holds true of the citations from decisions of states other than Nebraska and Wyoming, which decisions are referred to in the portion of the brief, pages 154 to 172.

The Nebraska cases cited are certainly very far afield. In fact, counsel admit that their connection with the issues in this case is remote when counsel states that they are "obliquely pertinent" (brief, p. 152). The case of *Livanis* v. *Northport Irrigation District*, 121 Neb. 777, 238 N. W. 757, is a rehearing of the case originally reported in 120 Neb. 314. Suit was brought against the Northport Irrigation District for damages for injury to crops from seepage water, the claim being made that the works of the Northport Irrigation District were negligently constructed and that such negligence imposed liability on the Northport Irrigation District. As stated in the opinion, the sole question was whether the negligence of the United States was imputed to the irrigation district. For that purpose, it was necessary to analyze the contractual relationship between the United States

and the Northport Irrigation District. The Nebraska Supreme Court anticipated the decision of this court in *Ickes* v *Fox* and came to the same conclusion as to the relationship between the landowners in the district and the United States. After analyzing the Nebraska statutes and determining the powers given to the irrigation district as to contracts with the United States, the court used the following language:

> "This statute is evidently the authority under which the contract in question was executed. Does this create a new type of irrigation district? Possibly not, considered as a corporate entity. But it does enable the district to contract for delivery at the land for water, without liability for negligence in the construction, operation and maintenance of the ditches of another, who is a common carrier so far as the owners of land in the district are concerned."

Clearly, insofar as the Livanis case has any bearing on the instant case, it is exactly in accord with, and even anticipatory of the decision of the United States Supreme Court in *Ickes* v. *Fox*, namely, that the United States is merely a carrier of water.

The case of *State, ex rel. Lackey* v. *Gering and Fort Laramie Irrigation District*, 129 Neb. 48, is even further afield. In that case an entryman complied with the provisions of the Reclamation Act in relation to an eighty-acre tract of which eleven and nine-tenths acres was classed as irrigable at the time of his entry. He proceeded to develop the land and ultimately received a patent to the eighty-acre tract, stating under oath that his entry embraced eleven and nine-tenths acres of irrigable land. Within two weeks after he had received his patent from the United States government, he brought this suit. The court said:

"An entryman for a reclamation homestead is required to reclaim at least one-half of the irrigable area of the land entered. 43 U. S. C. A., Secs. 439, 440. To obtain patent to his land, relator was required to show that he had reclaimed one-half of the irrigable area of the tract. He made this proof and stated under oath that his entry embraced 11.9 acres of irrigable land, and that all of this irrigable area had been cleared, leveled, sufficient lateral constructed and put in proper condition, the lands watered, cultivated, and that nine average crops had been raised thereon under irrigation. Within two weeks after receiving his patent, relator commenced this action.

"Relator contends that the United States government was granted an appropriation of waters by the state of Nebraska for all the land within the district. This contention cannot be sustained. In order to constitute an appropriation of public waters, it is necessary that there should be an application of water to some useful and beneficial purpose. Filing an application for an appropriation may be a necessary step to obtain the appropriation, but the appropriation is not completed until the water is actually applied to some useful purpose. 67 C. J. 990."

This, of course, is in accordance with the cases of *Commonwealth Power Company* v. *State Board of Irrigation*, 94 Neb. 613, and *Kersenbrock* v. *Boyes*, 95 Neb. 407, cited supra. We, of course, concede and, in fact, contend that while title to the land is in the United States government, it has the power to designate the land for which the appropriation is made and to exclude land within the area under the canal as non-irrigable. Since the original permit was issued while the land in question belonged to the United States government, the appro-

priation from its inception included only the land which the then owner designated as irrigable. Obviously, the patentee was not entitled to any rights greater than those initiated by the United States government, and he had only perfected appropriation rights for the eleven and nine-tenths acres. While he might be entitled to initiate an appropriation with a junior priority for the remainder of his eighty-acre tract, he could not claim under the 1904 appropriation water for a greater quantity of land than that for which the appropriation had been initiated.

The Nebraska case of *Nine Mile Irrigation District* v. *State of Nebraska*, 118 Neb. 522, is cited on page 168 of the brief in support of the claim that the ditch company or carrier of water is the owner of the appropriation. That was a suit against the state for damages resulting from the construction of a bridge across the North Platte River. The chief damage suffered was the obstruction of the north channel of the North Platte River turning the water away from the headgate of the Nine Mile Canal. The court merely held that this was a damage which the irrigation district suffered, since such obstructions to the channel compelled it to go to considerable expense to get water into its headgate. Obviously, the damage was directly to the irrigation works and the district, without joining the property owners as parties, had just as much right to bring the suit as if the damage had been actual physical destruction of the headgates, canal or other structures.

Kearney Water and Electric Power Company v. *Alfalfa Irrigation District*, 97 Neb. 139, is also cited as holding that the irrigation company is the owner of the appro-

priation. We have been unable to find any express language so stating, but, of course, it must be remembered that the Kearney appropriation was initiated in 1882 before the 1895 law which made the appropriation appurtenant to land. The status of a company which had appropriated water prior to 1895 or was the successor in interest to such appropriator is obviously different from that of an appropriator who has proceeded under the 1895 law and made application to the state department for a permit to construct the works, divert the water and furnish it to the water users.

The portion of the brief of counsel for the United States, from pages 167 to 169, is devoted to an attempt to interpret the Nebraska decisions as holding that the irrigation company owns the water which it diverts or carries. It is conceded, on page 167, that the cases of *Farmers Irrigation District* v. *Frank*, 72 Neb. 136, and *Enterprise Irrigation District* v. *Tri-State Land Company*, 92 Neb. 121, definitely and distinctly held that the irrigation company does not own the water. These are lightly dismissed as dicta on the apparent theory that to counsel for the United States anything in an opinion with which counsel disagrees is dictum.

The entire discussion, on pages 167 to 169, evidences the confusion throughout the brief for the United States in confusing ownership of water and ownership of rights in water. Attention is called to this in the first portion of this brief, supra, pages 5 to 11, inclusive, and the discussion therein contained need not be repeated. It must be pointed out, however, that no one owns the water, but that various rights in the water may exist and may be the subject of ownership. The owner of the

canal has certain rights in the water, and these are closely connected with and might even be considered to be a part of the appropriation. The carrier's right is to divert the water of the stream and carry it through his canal for compensation, such water to be furnished to the landowner, who is the actual appropriator. The carrier's right is unquestionably subordinate to the landowner's right, since the carrier can only divert the water as it is to be applied to a beneficial use, and the application to beneficial use depends upon the will of the landowner. The landowner can compel the carrier to divert and carry the water if it is available under the landowner's priority. The carrier cannot compel the landowner to receive the water and apply it to beneficial use. The rights of the carrier, which are mentioned in *Nine Mile Irrigation District* v. *State of Nebraska,* 118 Neb. 552, in *Enterprise Irrigation District* v. *Tri-State Land Company,* 92 Neb. 121, and in *Kearney Water and Electric Power Company* v. *Alfalfa Irrigation District,* 97 Neb. 139, are rights which the court will protect as against competing appropriators as well as against physical interference by improper structures.

The rights of the carrier, under the 1889 act and the 1895 act, respectively, in Nebraska, are clearly stated in the following language from *Enterprise Irrigation District* v. *Tri-State Land Company:*

> "Much of the argument in behalf of some of the plaintiffs discusses the question as to what constitutes an appropriation, and it is maintained with much force that there can be no valid and vested appropriation until the water diverted has been actually applied to a beneficial use. Many decisions of the courts of Colorado and other states are cited to

uphold this contention. A different view is taken in the brief of counsel appearing for the Belmont Company and Alliance Irrigation District. Quoting and construing the statutes of 1889, he says: 'The legislature never meant to encourage any one to invest their money in an enterprise, supposedly for a public good, and then to take away from him or them their appropriation simply because the landowner did not take the water within a specified time. That was a provision of subsequent legislation. The principle of the application of water to land before the absolute vesting of the appropriation was not of the essence of the act. * * * There is nothing in the act that in any wise indicates that water must be applied to land in order to make the appropriation absolute. The act provides that, within a certain time after the posting of the notice, actual work of construction must be begun and in good faith carried forward to completion, and that by 'completion' is meant conducting the water to the place of intended use—to such place on the line of the canal as the landowner desires to receive it into and carry it through his laterals. * * * The act of 1895 (section 28) speaks of the application of water to a beneficial use, or for beneficial purposes, but the act of 1889 nowhere does. After a canal was constructed under the prior act, therefore, and the water conducted through the same, if the owner at all times stood ready and willing to carry water for such landowners as would take it, he made all and the only application that he could make, and all that the act expected him to make, and his right to his appropriation continued as a developing right until all lands under the canal were using water, and thereupon ripened into a complete appropriation.' Counsel for other plaintiffs also concedes that 'in some states, by statute, an appropriation is treated as

effected when all the works are completed, the water is available for use, and there are lands reached by the system ready to be tilled by its occupants. In other states, by statute, the appropriation is not deemed complete until the beneficial use of water occurs. Such was the rule prior to legislation.' See, also, Sections 8-10, ch. 68, laws 1889, defining appropriation and completion of work. This subject is also considered to some extent in the monographic note to Nevada Ditch Co. v. Bennett, 60 Am. St. Rep. 777, 816 (30 Ore. 59), where the commentator says: 'The appropriation of water for sale to others is authorized by the statutes of the states in which it is valuable for that purpose, and, in many instances, the chief, and even the sole object of an appropriator is not that of any use by him in and upon his own lands or mines, but the sale of the water to others who have mines to be worked or lands to be irrigated. In cases of appropriation for the purpose of supplying water to others, we do not understand how it can be said that the use of the water is an essential element of its appropriation. If the intended appropriator constructs the works and appliances necessary for the diversion of the water and the carrying of it to points where its use is desirable and profitable, and has actually carried it there, or is ready and willing to do so, and offers it to all persons who are willing to pay for its use, we apprehend that his appropriation is complete, though the persons to whom it is thus offered refuse to receive or use it. They certainly cannot thus defeat the rights of the diverter.' What the rights of the canal owner or of subsequent takers may be in such case it is unnecessary here to consider. A discussion as to this point may be found in Sowards v. Meagher, 37 Utah 212, 103 Pac. 1112. This court has repeatedly said that a canal company is to a

certain extent a public service corporation; that it does not own the water that it carries, but acquires by appropriation the right to divert the same and to charge a reasonable fee for the carriage of the same to the lands upon which it was designed to be used. Paxton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co., 45 Neb. 884; Castle Rock I. C. & W. P. Co. v. Jurisch, 67 Neb. 377; McCook Irrigation & W. P. Co. v. Crews, 70 Neb. 115. Without further discussion, we are content to adopt the views as to what constitutes an appropriation under the act of 1889 thus stated by counsel, so far as relates to appropriation by a canal owner who is a carrier of water to be applied to a beneficial use upon land owned by others, with the reservation, however, that the water, formerly, must have been applied within a reasonable time in order to retain the first right to take it from the river, and, now, it must be applied within the time limited by the statute. Comp. St. 1911, ch. 93a, art. II, sec. 18."

The remaining cases cited by counsel, on pages 167 to 169 of brief filed on behalf of the United States, are clearly explained when it is understood that the rights of the carrier are different where the appropriation was initiated prior to 1895 from the rights where the appropriation was initiated subsequently. In the instant case, all rights claimed by the government were initiated in 1904 and, therefore, come under the 1895 act.

3. The Rights to Storage Water.

It is unnecessary to discuss extensively the nature of the rights of the United States to the disposition of the storage water which it has impounded by virtue of its 1904 appropriations in the Pathfinder Reservoir or its

appropriations in the Guernsey Reservoir or the Seminoe Reservoir. The Nebraska statutes, as above cited (Section 46-617, Comp. Stat. 1929), clearly give the right to store water. It might be noted incidentally that Section 46-628, Comp. Stat. 1929, quoted by counsel for the United States on pages 146 to 147 of their brief, contains the following language which was omitted from the quotation:

> "The United States and every person entering into a contract as herein provided shall have right to conduct such water into and along any of the natural streams of the state, but not so as to raise the waters thereof above the ordinary high water mark, and may take out the same again at any point desired, without regard to the prior rights of others to water to the same stream; but due allowance shall be made for evaporation and seepage, the amount of such allowance to be determined by the Department of Public Works. The Department shall supervise and enforce the distribution of such water so delivered with like authority and under the same provisions as in the case of general appropriators."

Obviously, this does give to the United States the power of control of stored waters somewhat different from that which it has in relation to direct flow waters. Since, however, the ultimate test of the rights in stored waters, as well as in direct flow waters, is beneficial use, we believe that the rights of the United States are dependent upon the action of the landowners in applying the water to beneficial use, and that the principles of *Ickes* v. *Fox* continue to apply, namely, that the United States has no beneficial interest in the storage water but only the right to furnish it to the landowners who will so apply it.

D.

SUMMARY IN RELATION TO THE GOVERNMENT THEORIES.

This section of the brief has necessarily been unduly prolonged by reason of the involved nature of the arguments of counsel for the United States. Simply stated, however, we believe that the arguments made on behalf of the United States must be rejected because no reservation of waters was authorized or attempted, and the government was not the owner so that it could make any such reservation. The rights of the government under the theory of appropriation are clearly those only of a carrier of water and as such carrier, the United States does not have the power of control which counsel seek to establish.

VI.

The Claim of the United States to Return Flow From the Kendrick Project.

As we understand the position of the United States in this proceeding, it is not at present making any extensive claims in connection with return flow. This no doubt is due to the limited possibilities of application of any abstract legal claims which are made, and we do not understand their position to be a waiver of the more extensive claims that they have elsewhere made and may elsewhere make in the future. For example, in the footnote to page 211 of the United States' brief, a disclaimer is made of any contention that the United States should have the right to exclusive disposition of Kendrick return flow water for diversion on its down

stream but separate North Platte Project. The contentions are made on pages 209 to 215, one, that recommendation number five, pages 178 to 179 of the Master's Report, does not give equal treatment to Wyoming diverters with Nebraska diverters, and, two, that the same recommendation should be modified to permit the use on the Kendrick Project of a greater amount of water from upstream sources in lieu of and in compensation for certain return flows which are expected to come from the Kendrick Project.

A.

THE CLAIM OF THE RIGHT OF WYOMING APPROPRIATORS TO RE-DIVERT KENDRICK RETURN FLOW AFTER IT REACHES THE STREAM.

So far as concerns the first point, we believe that the suggestion of the United States misinterprets the meaning of the Master's recommendation, but we have no objection to part of the modification proposed. We would be agreeable to the substitution for the first clause of paragraph 5, page 178 of the Master's Report, a provision that return flows of the Kendrick Project are, for the purposes of the decree, deemed to be natural flows when they have reached the North Platte River. The remainder of the proposal of the United States in this connection, as made on page 211, actually relates to the other portion of the United States' objections, and we believe that all purposes would be satisfied by the substitution above agreed to.

B.

THE CLAIM OF THE UNITED STATES TO SUBSTITUTE UPSTREAM WATER IN LIEU OF RETURN FLOWS FROM PORTIONS OF THE KENDRICK PROJECT.

This contention, found on pages 212 to 215 of the United States' brief, involves also the discussion contained on pages 172 to 173 of the brief, and the cases therein cited. This involves the entire question of ownership of return flow which we believe has never actually been presented to this court, and which we believe should be now decided.

The only case in this court which we have been able to find on this subject is that of *Ide* v. *United States*, 263 U. S. 497. That case permitted the recapture of return flow waters while still on the project for re-use on the same project for which originally diverted and certainly did not extend to the extreme degree now being proposed by the United States. In fact, this court has never held that after return flow waters reach the stream from which originally diverted, they can be recaptured by the original diverter. The proposal now being made goes to a still more extreme degree. It is not proposed that the particular return flow waters involved (assuming that they can be identified after they have reached the stream) should be re-diverted. Instead, the proposal seems to be that recognition should be given to the alleged fact that these return flow waters enrich the stream, and that the party responsible for such enrichment (here claimed to be the United States) should be permitted to divert out of priority waters from upstream of an equivalent amount.

The proposal of the United States ignores the fact that the stream was originally depleted by the amount of water originally diverted, and that only a portion of that which was so diverted again reaches the stream as return flow. The net effect of the operation on a project such as the Casper Alcova Irrigation District of the Kendrick Project is unquestionably a net depletion of the stream and not an enrichment.

Moreover, no practical method is proposed by which it can be determined what portion of the return flow from the Kendrick Project will come from the "sump" areas and how identification can be made when the water reaches the stream of the amount which can so be attributed to recovery from sumps.

We believe that it will be worthwhile to discuss the general question of ownership of return flow and are, therefore, proceeding to discuss that question.

1. The Legal Right of a Carrier of Water to Control Drainage and Seepage Water Flowing in Drains Draining the Water From the Lands to Which the Carrier Supplies Water.

This question was, of course, decided by the Circuit Court of Appeals for the Eighth Circuit adversely to the contentions of the State of Nebraska in the case of *United States* v. *Tilley*, 124 Fed. (2d) 850. While the state irrigation authorities of the State of Nebraska were parties to this litigation, the State of Nebraska was not a party and, therefore, the decision is not res judicata.

It is elementary that neither a state nor the United States is bound by doctrines of res judicata by a decision to which the state or the United States was not a party,

even though a responsible officer of the state is made a party in his official capacity and his official acts are sought to be controlled. This has many times been decided by this court. The following cases abundantly establish this principle. In the citations we have noted after each case whether it involved an attempt to bind a state or the United States:

Tindal v. *Wesley*, 167 U. S. 204, 42 L. Ed. 137 (State).

Sage v. *United States*, 250 U. S. 33, 63 L. Ed. 828 (U. S.).

McLellan v. *Carland*, 217 U. S. 268 at 282, 54 L. Ed. 762 at 767 (State).

Bankers Pocahontas Coal Co. v. *Burnet*, 287 U. S. 308 at 312, 77 L. Ed. 325 at 329 (U. S.).

Hussey v. *United States*, 222 U. S. 88, 56 L. Ed. 106 (U. S.).

Carr v. *United States*, 98 U. S. 433, 25 L. Ed. 209 (U. S.).

United States v. *Lee*, 106 U. S. 196 at 217, 27 L. Ed. 171 at 180 (U. S.).

We, of course, concede that *United States* v. *Tilley*, 124 Fed. (2d) 850, is a precedent against the claims of the State of Nebraska and, so far as a decision of a Circuit Court of Appeals weighs with this court as a precedent, is of importance upon this issue. We do not, however, believe that this court is bound by it as a precedent, and certainly the State of Nebraska is not bound by it under principles of res judicata. We, therefore, ask this court to consider the matter anew.

a. The General Principle of Ownership of Return Flow.

So far as we can discover, this court has not decided this question in a case where a state was a party claim-

ing the right under its sovereign powers to control drainage water as public water available for distribution to its appropriators under their priority of appropriation. All of the previous cases involved the claim of right on the part of respective appropriators as among themselves. Now the State of Nebraska asserts its claim that the waters flowing in the drains are public waters subject to the rule of priority of appropriation and are thereby distributed in accordance with that rule. The question is, therefore, squarely presented to this court as to whether the state's powers control or the carrier of water can reach out after the water is delivered and has been used and then retake control of it. We contend that the carrier has no such control. We cite to the court the following authorities:

In *Richlands Irr. Co.* v. *Westview Irr. Co.*, (1938) 96 Utah 403, 80 Pac. (2d) 458 at 465:

> "We must know judicially that the water in a river between any two opoints is not accumulated there solely from the contributions thereto from marginal sources, but that the major portion thereof comes by natural flow from upstream sources which have fed the channel itself, step by step, clear back to its ultimate source or sources. The entire watershed to its uttermost confines, covering thousands of square miles, out to the crest of the divides which separate it from adjacent watersheds, is the generating source from which the water of a river comes or accumulates in its channel. Rains and snows falling on this entire vast area sink into the soil and find their way by surface or underground flow or percolation through the sloping strata down to the central channel. This entire sheet of water, or water table, constitutes the river and it never ceases to be

such in its centripetal motion toward the channel. Any appropriator of water from the central channel is entitled to rely and depend upon all the sources which feed the main stream above his own diversion point clear back to the farthest limits of the watershed."

It is submitted that this view must be taken of the waters which are subject to public control since otherwise there might be no water in the stream. The stream cannot generate itself; on the contrary it is fundamentally the result of the drainage of the entire basin within the watershed. Waters naturally within that basin which in the course of nature would supply the flow of the stream must necessarily be a part of the waters publicly controlled and a part of the waters described as "the waters of every natural stream."

The situation is somewhat parallel to that rule many times laid down by the United States Supreme Court, namely, that federal control of navigable streams gives corresponding control of tributaries to navigable streams since otherwise navigation might be destroyed by destroying the source of the water which makes the stream navigable. (See *U. S.* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 43 L. Ed. 1136; *U. S.* v. *Appalachian Power Co.*, 311 U. S. 377, 85 L. Ed. 243; *Oklahoma* v. *Atkinson*, 313 U. S. 508, 85 L. Ed. 1487.)

The conclusion to be drawn, therefore, is that both under the common law system of irrigation by riparian rights and the statutory system of irrigation by appropriation; the basin wide sources of the waters of the natural streams must be recognized; for the purpose of making possible the exercise of either riparian common

law or statutory appropriative rights to irrigation, it is necessary that public control must be exercised where feasible before the waters reach the channel of the stream; and where consistent with the public policy of Nebraska of making the utmost out of water resources, certain rights of diversion must be recognized.

The principle announced in the above cited Utah case is the one usually applied and recognized in states where irrigation is practiced. For example, in *Smith* v. *Gaylord*, 179 Cal. 106, 175 Pac. 449, it was held that where waters which had formerly come to the stream naturally, were brought to the stream by a tunnel which tapped their source, the waters were part of the natural flow of the stream, at least to the extent of its previous flow, and, therefore, subject to appropriation.

It was held in *Miller* v. *Wheeler*, 54 Wash. 429, 103 Pac. 641, 23 L. R. A. (N. S.) 1065, that springs which are the fountainhead of a living watercourse are part of the stream and must be preserved for prior appropriators as against the landowner on whose lands they arise.

It was held in *Jones* v. *McIntire*, 60 Idaho 338, 91 Pac. (2d) 373, that the waters of natural springs which form a natural stream flowing off the premises on which they arise are public waters subject to acquirement by appropriation.

In *Midway Irr. Co.* v. *Snake Creek Mining & Tunnel Co.*, (C. C. A. 8) 271 Fed. 157, the suit arose in connection with a Utah controversy over the right to use the waters flowing from a tunnel used in mining. The controversy was between the mining company which claimed to own the waters on the theory that it had "tapped and

developed" a new supply of water, and on the other hand the prior appropriators from the stream whose supply was diminished by this tunnel development which intercepted the waters which would otherwise flow in the irrigators' source of supply. The court adopted the rule found in 2 Kinney, Irrigation and Water Rights, Sections 1193 and 1194, as follows:

> "The court then adopts as the correct principle the rule found in 2 Kinney, Irr. and Water Rights, Sections 1193 and 1194, which is quoted in full and reproduced here:
>
> " 'It was not until the more recent scientific investigations, before mentioned, as to the movements of underground waters through the soil, that these percolating waters tributary to surface waters were recognized as belonging to any particular class, or that any rights could be acquired in them other than the rights which could be acquired to the soil itself, through which they found their way, of which soil, under the prevailing common-law rule, they were considered component parts. But, by these geological and topographical investigations made by the government and others, it has been proven in many instances that waters percolating through the soil of watersheds were not only the sources of supply, but the only source of supply of certain streams and other surface bodies of water. It being proven absolutely that these percolating waters physically are directly tributary to these streams, the law has kept pace with these scientific investigations proving this fact; and therefore it follows that in law they should be, and in many jurisdictions are, dealt with and treated as tributary waters. And, where rights to the waters of the stream itself have been once acquired, by appropriation or otherwise, it is unlawful for persons owning land bordering on the stream to intercept the waters percolating through them on

their way to the stream, and apply it to any use other than its reasonable use upon the land upon which it is taken, if he thereby diminishes the flow of the stream to the damage of those having rights therein. Therefore this rule modifies the common-law rule that the owner of the land is also the owner of all the water found percolating as a part of the soil itself, and that he may use and dispose of it as he sees fit, to the extent that he may only use these waters so percolating through his land, subject: First, to the rights of others to the water flowing in the stream which this water augments, upon the same principle as though this water was a part of the stream itself. * * *' "

The United States Supreme Court affirmed the decision of the Circuit Court of Appeals in *Snake Creek Mining and Tunnel Co.* v. *Midway Irrigation Co.*, 260 U. S. 596, 67 L. Ed. 423, holding the rights of the irrigators to be superior and paramount over the rights of the mining company which had intercepted the waters and thereby diminished the supply of the irrigators.

In *Marks* v. *Hilger*, (C. C. A. 9) 262 Fed. 302, the court said:

"It is established in Montana that the prior appropriator of water is entitled to the use of all the water in the stream to satisfy his appropriation, whether such water comes from seepage or from the water naturally flowing in the stream. In Beaverhead Canal Co. v. Dillon Electric Co., 34 Mont. 141, 85 Pac. 882, the court said:

" 'The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may

have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snowfall, or by springs or seepage which directly contribute.'

"Again, under the doctrine that the prior appropriator is entitled to the quantity of water appropriated from the stream, the prior appropriator is entitled to satisfy that right, and it is immaterial whether such satisfaction is to be had out of the waters that naturally flow in the stream and its tributaries above the head of its ditch, or come from waters, which run into the stream by rains, snows, springs, or seepage.

* * *

"Our conclusion is that the lower, but prior, appropriators are entitled to the uninterrupted flow of the waters of the stream and its tributaries, and that, where seepage water may have found its way into the creek, the prior appropriators are entitled to the use of such water, limited of course to the extent of the quantity of water judicially decreed to them from the creek. Wiel on Water Rights, 337."

In *Rasmussen* v. *Moroni Irr. Co.*, (decided in 1920) 56 Utah 140, 189 Pac. 572, the court said:

"This case falls within what for convenience may be denominated 'a river system case' which arises and can arise only in irrigating lands which lie along and within the watershed of a river, stream, or watercourse, whether natural or artificial, from which the seepage and run-off water arising from irrigation if not intercepted will eventually return to the stream or watercourse from which it was originally appropriated by prior appropriators and diverted by them

at some point further down the stream. In such cases the rights of prior appropriators may not be interfered with, not even by the owners of lands from, through, or underneath the surface of which the seepage and percolating water passes on its return to the stream or river system."

In the concluding part of the opinion the court said:

"The fact that the water in question may be percolating or seepage, as contradistinguished from the water flowing in known and defined underground channels, does not alter the case. The controlling question always is: *Was the water in question appropriated and put to beneficial use by others before the interception and attempted appropriation thereof by the landowner?*" (The italics are ours.)

In the case of *Ft. Morgan Reservoir and Irr. Co. v. McCune*, (1922) 71 Colo. 256, 206 Pac. 393, a reservoir and irrigation project had been constructed, and a few months thereafter a drainage ditch was constructed by the owners of the reservoir and irrigation project, for the purpose of recapturing seepage water. The water recaptured by the drainage ditch was immediately supplied to consumers for irrigation purposes. The court held that the seepage water having become intermingled with other underground water and being destined to return to the stream and to inure to the benefit of appropriators on the stream if not interfered with was necessarily a part of the waters of the stream, and that the drainage ditch was an unauthorized interference with the rights of the appropriators. The court said:

"These cases show that it has been held by this court that the question of diligence in attempting a recapture, or the time during which the seepage has run, or the question whether or not the water was

appropriated when not needed for direct irrigation, is not material. When it has become, potentially, under the rule above stated, a part of the river, it belongs to the appropriators in the order of their priorities whenever needed. It cannot, therefore, be made the subject of a direct appropriation, nor can it, by a fiction, be regarded as still in storage, or a part of stored waters."

In *Breyer* v. *Baker*, 31 Idaho 387, 171 Pac. 1135, the court applied the test as to whether the water which was the subject of controversy came from a source outside the watershed. The court held that if it came from outside the watershed it could be intercepted before it reached the stream without regard to the claims of the prior appropriators having appropriations from the stream, but if it came from a source within the watershed it could not be intercepted to the damage of the rights of appropriators from the stream, and must be permitted to come down intact for their use.

In *Wills* v. *Morris*, 100 Mont. 514, 50 Pac. (2d) 862, it was held that seepage waters which were collected in a drainage ditch were subject to appropriation. (See also the case of *In re German D. & R. Co.*, 56 Colo. 252, 139 Pac. (2d) at p. 7; also *Binning* v. *Miller*, 55 Wyo. 451, 102 Pac. (2d) 54 at p. 63.)

b. The Effect of Upstream Benefits.

It is unquestioned in this case that the junior appropriator acquires certain benefits due to the fact that down stream seniors divert and use return flow waters, thereby decreasing their demand upon the supply of natural flow upstream, thus enabling the senior who diverts upstream, to use natural flow waters which would

otherwise be required for the supply of those down stream seniors. This is admitted by the witness, Andrew Weiss, former project manager of the North Platte Project, called as a witness for the United States, in his cross-examination commencing on page 20,782. We quote from his testimony:

"Q. Now, Mr. Weiss, when the return flows are used on the river to supply appropriators from the river, that, of course, releases water further up the stream, does it not?

A. It should, certainly.

Q. If, for instance, an appropriator on the river with a priority of, we will say, 1892, is supplied with water from the return flow from the drains, that appropriator then has no demand upon water rising further upstream, that is correct, isn't it?

A. That is correct.

Q. And when the appropriators senior to 1904 in the Scottsbluff area are supplied with water taken from the drains or from the invisible accretions in the stream, that enables the Interstate Canal and the Gering-Fort Laramie Canal to take water that might not otherwise be available for them, isn't that right?

A. Yes, sir.

Q. That was the practice, was it not, during the time that you were project engineer or project manager?

A. That was the practice insofar as it was physically possible to do so.

Q. And that was the uniform practice, was it not, while you were there, so far as the return flow waters were available in that way?

A. So far as it was within our power to do so. For instance, we diverted from the Sheep Creek into the Tri-State Canal, which was in accordance with

a court decision. The river administration was in the hands of the State authorities, with whom we did not interfere.

Q. The diversion of the Sheep Creek water into the Tri-State Canal was treated by the Nebraska Department as what they called an optional diversion, was it not?.

A. I am not sure how they treated that.

Q. What I mean is, the quantity which was diverted into the Tri-State Canal from Sheep Creek was deducted from the headgate diversions of the Tri-State from the river, so that the total diverted both from Sheep Creek and from the river would not exceed the amount of their appropriation, that is correct, is it not?

A. I think that is correct.

Q. And that, of course, is, in effect, an exchange of water?

A. Well, yes.

Q. So that, by using the Sheep Creek water, a portion of the North Platte River water that would otherwise be taken by the Tri-State was released for other appropriators lower down, that is correct, isn't it?

A. I presume so."

Thus it is clear that the Kendrick Project will obtain the benefits of the return flow without the modification of the Master's Report urged by counsel for the United States. The summer return flow, estimated at 46,000 a. f. on page 138 of the Master's Report, will be treated as natural flow, and will go to supply senior appropriators down stream. When this happens, a corresponding amount will be released for juniors up stream, and undoubtedly the Kendrick Project will share in those benefits. The United States now proposes that the Ken-

drick should be permitted to divert still more "in lieu of" the return flow, out of which it is already receiving benefits. This proposal would give the Kendrick double benefits.

It must be evident from the decision of this court in *Ickes* v. *Fox*, 300 U. S. 82, 81 L. Ed. 525, that the water rights are owned by the water users and the United States is only the carrier of water. When the water has been applied to the land and drainage has taken off from that land the surplus waters, which are not consumptively used, the water right has fulfilled its function. If any benefits are to be realized from that drainage, they obviously should be given to that water user. However, he has already realized those benefits in obtaining water from natural flow to which his priority would not entitle him but for the fact that the drainage water supplies those down stream irrigators who are senior to him. In order to maintain the balance between these water users, obviously, the situation which has naturally come about should not be disturbed.

The State of Nebraska in making distribution of this return flow water use it to the greatest advantage and in accordance with the fundamental plan of priority of appropriation. We submit that this should not be upset, and that the rights of the water users, senior to the 1904 priority, should be established in the return flow.

c. *The Cases of Ide v. United States, 263 U. S. 497, 68 L. Ed. 407, and Ramshorn Ditch Company v. United States, 269 Fed. 80, Are Not Inconsistent With This Theory.*

The case of *Ide* v. *United States*, 263 U. S. 497, 68 L. Ed. 407, involved the relative rights of the United

States and of a private appropriator who sought to establish an appropriation on water flowing in a ravine which was the result of drainage from the application of water to the previously developed portion of the Shoshone Project in Wyoming. The United States desired to supply this water to lands within the project to which the United States still held title. The operation and maintenance of the works had not been transferred to the irrigation district. It was not a question of the United States taking water which would otherwise be available for senior appropriators, and the State of Wyoming was not a party nor was it seeking to have the water made available for irrigators with rights senior to the United States.

Moreover, it must be clear that insofar as the case is inconsistent with *Ickes* v. *Fox*, 300 U. S. 82, 81 L. Ed. 525, it must be considered to be overruled. Since the latter case definitely holds that the United States is only a carrier of water, and that the carrier of water does not own the appropriation, it necessarily follows that the United States, as against the State of Nebraska, has no right to the water after it has left the Kendrick Project.

The case of *Ramshorn Irrigation District* v. *United States*, 269 Fed. 81, is likewise not applicable. This case likewise involved the rights of a private irrigation company as against the United States, and the state was not a party nor was it asserting any claim of the right to use the water as against the priority rights of the senior appropriators. In fact, there was no shortage of water, and the Ramshorn Ditch Company was merely attempting to use the return flow waters in Sheep Creek as a matter of convenience in getting the water and in order to avoid the expense of a costly diversion dam in the stream.

The chief ground for decision was a Nebraska statute passed in 1913 and appearing on pages 319 to 329 of the Session Laws of 1913, Sections 3426 and 3427, Revised Statutes of 1913. This statute was repealed in 1919 by the Nebraska legislature, but was in force on December 20, 1918, when the district court decided the case (254 Fed. 842)., which was the subject matter of the appeal in the Circuit Court of Appeals (269 Fed. 81). This statute was permissive in character permitting the diversion of the return flow waters and both the district court and Circuit Court of Appeals put great reliance on it. Obviously, when the permission is revoked, neither the United States nor anyone else claiming an interest under an appropriation has any standing to claim rights by reason of that permission.

Another point of difference (and this applies, likewise, to the distinctions of the instant case and the Ide case) is that no question of the upstream benefits was involved or raised in connection with the case. Here we have clearly shown the benefits taken and enjoyed by the diversion of water under the junior appropriation.

We believe that neither the Ide case nor the Ramshorn case stand in the way of the theories which we are proposing, and that this court should decide the question of the right to control the return flow under the facts and circumstances as proved here.

2. The Right of the United States Under the Federal Statutes.

In the discussion which has gone before, we have discussed the right of the United States viewed as a carrier of water with no different restrictions or statutory

background than any other carrier of water. However, as repeatedly mentioned, hereinbefore, the United States is operating through the Bureau of Reclamation, which is an administrative bureau governed, controlled and restricted by the appropriate federal legislation. This legislation is found in the Reclamation Act and the acts amendatory thereto. It is noteworthy that no power is given to the Bureau of Reclamation or to the Secretary of the Interior (under whose authority the bureau operates) which would justify the attempt on the part of the United States to take control of the return flow water. As above pointed out, the Reclamation Act is clearly enacted for the purpose of ultimately enabling the water users to manage their own project subject to the state law. This scheme is in process of realization through the organization of the various irrigation districts such as the Casper Alcova Irrigation District. The responsibility and rights of the water users is recognized by the government in assessing the costs of the drainage and other structures against the landowners. There seems to be no room in the structure of rights and duties growing out of the Reclamation Act Projects for the United States to step in after the water has been delivered to the irrigation districts and in turn, by those districts delivered to the landowners, and then claim that when drained off of the lands the water is subject to the control of the United States regardless of state laws.

VII.

The Practical Difficulties of the United States' Contentions.

When counsel for the United States concede as they must that the rights, if any, of the United States are un-

der 1904, 1931, 1934 and 1936 priorities and subject to all senior appropriations on the river, they have necessarily conceded that there must be a state control exercised. Apparently, the contentions of counsel are only that the appropriations initiated by the United States must be under United States control regardless of state laws, but that these appropriations are subject to all senior appropriations made under state laws, and that in turn they are senior to those made subsequently under state laws. This immediately raises the question as to the practical method of carrying into effect this legal situation. If the appropriations claimed by the United States are junior to other Nebraska appropriators, then some method must be devised of controlling those appropriations so that they will not encroach upon the rights of those juniors. Equally if they are senior to other Nebraska appropriators, some superior authority is necessary to control those Nebraska juniors so that they will not encroach upon the rights claimed by the United States.

It is not enough to say that the government agents can be trusted to recognize the rights of these senior appropriators. The Master's Report, page 104, shows large out of priority diversions and large quantities of out of priority storage made by Bureau of Reclamation officers in the years 1931 to 1936. The bitter experience of the last ten years, particularly with the repeated out of priority diversions and storage made by agents of the United States over the protest and objection of the Nebraska irrigation authorities, demonstrate that the managers for the United States are not to be trusted to respect the rights of Nebraska seniors. Only some superior power having control of both the diversions controlled

by the United States and the diversions controlled by other appropriators is capable of handling the matter.

The administration of the river is sufficiently complex when three states with independent powers administer respectively certain sections of the river. It becomes infinitely more complex when the United States interposes its claim to sovereign and uncontrolled powers over certain diversions scattered up and down the river. Unified control is we believe the only answer to the problem, and we have proposed that on pages 40 to 43 of our opening brief. Certainly the problems of administration do not grow any less if the theory put forward by counsel for the United States should be sustained. On that theory, we would have a further independent sovereignty claiming along with each of the three sovereign states the right to control water independent of anyone else.

We believe that it is clear that Congress never had any intention of setting up such a competing agency to interfere with the powers of the states.

VIII.

Apportionment of Water to the United States as a Separate Sovereignty.

The portion of the brief of the United States, pages 183 to 193, includes certain contentions with which we must disagree as well as others which are in entire agreement with the contentions made in Nebraska's initial brief. So far as the argument made in this portion of the United States' brief deals with its Exception No. XIV and the proposal that natural flow below Guernsey outlet should be distributed on the basis of a priority schedule, Nebraska is in entire agreement, and we welcome

the assistance of the United States in one of our principal contentions.

However, insofar as this section of the brief relates to Exception No. III of the United States, we must take issue, and we believe that our position is thoroughly supported by the arguments contained in the foregoing sections of this brief. The United States' claim that a specific apportionment should be made to it is, of course, upon the theory that it has sovereign powers over the natural flow waters appropriated for the North Platte Project coordinate and parallel with the sovereign powers of the States of Wyoming and Nebraska over the waters appropriated and diverted and used within the respective states. United States' Exception III is, of course, a corollary and a necessary conclusion drawn from its principal argument of United States' ownership of water. It extends that theory to a contention that an area exists wherever there is a United States reclamation project which is a sort of additional "District of Columbia" over which the states have no power, and the United States has the sovereign powers, at any rate, so far as concerns water rights in such areas. We have always understood that under the American constitutional system, only in the District of Columbia are there lands and rights in real estate privately owned which are subject only to the sovereign powers of the United States and not to sovereign powers of any state.

Awarding water to the United States on an equitable apportionment basis, as urged by the United States in its brief, would be in effect the creation of a new area within the United States in which the United States was exclusively sovereign over certain property rights of individuals within the area, and this sovereignty would

be carved out of and subtracted from the sovereignty of the states already existing and within whose territorial limits such sovereign powers were to be exercised. We believe that the mere statement of the position of the United States carries with it its own refutation.

IX.

Definition of Storage Water.

Growing out of Exceptions IV and XV of the United States, in its brief, pages 193 to 197, the United States urges a particular definition of storage water to be used in the decree to be entered in this case.

We have no objection to a proper definition of the term, and in fact, we agree that the more particularly and specifically terms used are defined, the less opportunity there will be for controversy in connection with the future operation of a decree. However, if we understand the definition proposed, pages 195 to 196 of the brief, we believe that it is wholly improper and not allowable, and that it does violence to the ordinary meaning of the term "storage water" as well as being out of harmony with the plain purposes of the Master's Report.

We understand the proposal to mean that the term storage will include not only water that has been held back in the reservoir but also any water which is discharged through the reservoir to meet the natural flow requirements of any canal as recognized or prescribed in the decree. Certainly the definition quoted or paraphrased from *Gila Valley Irrigation District* v. *United States*, 118 Fed. (2d) 507, is much more nearly a natural definition, and, in fact, we would have no objection to the use of such definition in the decree.

The difficulty in defining arises out of the fact that the reservoirs on the North Platte River are principally channel reservoirs. These are the Seminoe, Pathfinder, Alcova and Guernsey. Frequently during the irrigation season natural flow from upstream is passed through a channel reservoir at the same time that storage is released. It is easy enough to recognize storage water which is delivered into the river through a canal from an off channel reservoir. With a channel reservoir, however, the release of storage water can only be through allowing more water to flow out of the outlet of the channel reservoir than the natural flow which comes into it through its various inlets. Obviously, water which flows in the river below the outlet when the storage process is operating cannot be considered as released storage water. Where the outlet flow is equal to or less than the intake, none of the water coming out of the outlet can be considered to be storage because it has never been impounded or held back. Equally, that portion of the water passing through the outlet which represents the amount of natural flow being taken in at the intakes cannot be considered as storage even when the water passing out is greater than the inflow.

We would, therefore, suggest as an alternative or substitute definition to that proposed by the United States that storage water be defined as follows:

> "1. All water being delivered into the natural channel of the river from an artificial off-channel reservoir. 2. All water which has been previously impounded or withheld in a channel reservoir and is delivered down the natural channel including, however, only the amount by which the water passing through the outlet of such channel reservoir ex-

ceeds the amount of the current intake of natural flow."

The definition proposed by the United States, if we understand it correctly, is actually designed to give to the United States control as storage water of all water of any nature or description originating above the Pathfinder or Guernsey Reservoirs and intended for any project which has storage rights either as a part of the North Platte Project or through the Warren Act. By a forced and unnatural definition it is an attempt to transform what is in fact natural flow originating above the reservoirs into storage.

X.

Proposed Limitation on Nebraska's Apportionment of Natural Flow Water to That Which is in Fact Being Diverted by the Canals Listed in Recommendation 3(b).

We wish to take issue with the proposed modification of the decree contained in Part VII of the brief of the United States based upon its Exception IX and argued on pages 202 to 209 of that brief. It is apparent that the proposal made by the United States in the portion of the brief referred to is an attempt on the part of the United States to avoid the effect of the Warren Act contracts with Nebraska appropriators and the contracts made by the United States with the Nebraska irrigation districts which are comprised within what is loosely termed the North Platte Project. Since the result of this proposal would be to violate those contracts and to violate Nebraska's statutory rule of priorities the operation of which is guaranteed by the case of *Wyom-*

ing v. *Colorado*, 309 U. S. 572, 84 L. Ed. 954, we believe that the United States proposal is entirely inadmissible.

We understand the proposal to be stated at the bottom of page 205 of the United States brief, to the effect that the reservoirs above Whalen could be permitted to store water and the Kendrick Project to divert whenever the Nebraska canals at or above Tri-State Dam are not diverting and using natural flow or to whatever extent they are not diverting and using the amounts set up for them in recommendation 3 (b).

The effect of this proposal would be that whenever a junior Nebraska canal having storage rights was closed to natural flow due to operation of Nebraska priorities, it could not make up the deficiency in its supply in relation to its requirements by asking for storage water even though its contract with the United States was designed to cover exactly that situation and to guarantee the supply. Not only is this contrary to the previous decision of this court in *Wyoming* v. *Colorado*, cited supra, but also it is wholly inequitable as being an attempt to interfere with contract relationships that are unquestionably valid, and it is particularly inequitable, since the United States is itself making the proposal and the United States is the contracting party which would thus be relieved of the obligation of the contract.

It is fundamental in the principle of equitable apportionment of the waters of interstate streams as among the states through which they flow, that when water is by the decree made subject to the jurisdiction of a particular state, the laws of that state as to the distribution must apply. The very recent case of *Wyoming* v. *Colorado*, 309 U. S. 572, 84 L. Ed. 954, very definitely lays

down that rule and requires the result just expressed. This case was an outgrowth of the earlier case of *Wyoming* v. *Colorado,* sometimes referred to as the first Laramie River case, and reported in 259 U. S. 419, 66 L. Ed. 999. In the earlier case a total of 39,750 acre-feet annually out of the Laramie River was awarded to Colorado on the basis of certain Colorado appropriations therein specified. Thereafter, the Colorado state courts redistributed this allotment of water awarding to some of the appropriators mentioned in the original Supreme Court decree more than there awarded and to others less. The Colorado redistribution is referred to as the suit of *Benziger* v. *Water Supply and Storage Company* whose effect is described in this court's opinion, 309 U. S. 572 at pages 575 to 576, 84 L. Ed. 954 at 956 to 957. The redistribution so made by the Colorado decree in the Benziger case was found by the Colorado court to accord with the Colorado rule as to priorities.

This court held that redistribution made in the Benziger case must be upheld, and that the water which Colorado received by the earlier decree must be distributed on the basis of the Colorado law.

Applying this principle to the instant case, we find that it necessarily follows that any water which enters the State of Nebraska must be subject to Nebraska law as to its distribution. Storage water delivered into Nebraska must go to those whose storage rights in that water are recognized by Nebraska law, and any natural flow must be distributed in accordance with the Nebraska rule as to priorities.

Some of the contracts involved are in the record presented by the United States and are found as follows: Nebraska Exhibit 567, contract with Gering-Fort Lara-

mie Irrigation District; Nebraska Exhibit 570, contract with Pathfinder Irrigation District; Nebraska Exhibit 574, contract with Northport Irrigation District, and Nebraska Exhibit 575, supplemental contract with Northport Irrigation District. These contracts and the Warren Act contracts concededly require the United States to supplement the supply from other sources, by storage water up to the limit of the amount fixed as to the requirement when the other sources fail to fill such requirements. This is further evidenced by the description of the Warren Act contracts in the Master's Report, pages 34 to 35 and 189 to 195. Thus, there is an unquestioned obligation on the part of the United States, so far as storage supplies are available and within the respective prior and preference rights that may have been created in connection with such storage reservoirs, to supply storage water when natural flow and other sources are insufficient to supply the requirement.

In entering into these contracts, it is obvious that the representatives of the United States, namely, the officers of the Bureau of Reclamation, must have had in mind the nature of the supply from sources other than storage which would be available under Nebraska priorities. The principle for which Nebraska contends is nothing new nor does it import any further burden upon the United States into the contract, since we do not propose any change from the conditions as they existed at the time the contracts were entered into. On the contrary the United States proposes that the contracts be in effect modified so that if Nebraska law required the closing of a state line canal to natural flow for the benefit of a senior natural flow user downstream, the state line canal could get no storage water.

To take a concrete example, we might take the situation of the Gering Canal which is both a Warren Act contractor and which is likewise included among the so-called "state line canals" to which protection is afforded by the provisions of paragraph 3 of the Master's proposed decree. The Gering Canal also has a relatively late priority. We refer the court to the table on page 49 of Nebraska's initial brief. From this, it will be seen that the Gering is junior to all of the other state line canals except only the Northport, and that the total second-feet appropriations as determined by the Master of those senior state line canals is 939 second-feet. In addition, the Gering is junior to the following Nebraska canals lying between the Tri-State Dam and Bridgeport having the allotments as shown:

Canal	Second-feet Allotment
Minatare	99
Winters Creek	19
Enterprise	32
Castle Rock	86
Logan	3
Belmont	112
Central	23
Chimney Rock	71
Empire	20
Short Line	39
Nine Mile	71
Steamboat	3
Total	578 Second-feet

The Gering is thus junior to 578 second-feet of appropriations which lie below Tri-State Dam and which are thus entitled under Nebraska law to require the Gering to be closed to natural flow for their benefit when their local supplies run short. Again, we point out that this condition existed at the time when the Gering Warren Act contract was entered into, and that, therefore, it must have been within the contemplation both of the United States and the Gering Irrigation District as the basis for that contract.

It is true that the Master finds that as a rule there is sufficient return flow and other local supplies entering the stream below Tri-State Dam to take care of these priorities. The fact, however, is clear from the record that such conditions do not always prevail, and that there are times when such supplies are insufficient. We call the court's attention to the tables on page 53 of Nebraska's initial brief which show that in 1934 Chimney Rock received 57 per cent of its July to August requirements; in 1936, 60 per cent, and in 1940, 47 per cent. Similar conditions are shown for other canals in that table. Whenever such a condition exists, Nebraska law requires that Gering be closed for the benefit of Chimney Rock and likewise for the benefit of such other senior canals as may be short of water. Such closure is, of course, only a closure to natural flow, and the Warren Act contracts were made specifically for the purpose of guaranteeing storage water to replace the natural flow thus subtracted from Gering's supply. Gering Irrigation District has paid large sums of money to the United States for that protection, and now the United States proposes to withdraw it. We can hardly conceive of a more inequitable treatment of irrigators who have in good

faith contracted with the United States and have paid to the United States the amounts agreed upon as the proper consideration for such protection.

The proposal of the United States is still more puzzling in the light of the fact that some of the canals below Tri-State Dam are themselves Warren Act contractors. We refer to page 190 of the Master's report which shows that Central Irrigation District, Chimney Rock Irrigation District, Brown's Creek Irrigation District and Beerline Canal Company are all entitled to the benefits of storage water from Pathfinder under Warren Act contracts. Although the United States' proposal does not specifically so state, it is inferable that the United States really wishes to repudiate these contracts under the guise of asking this court to prevent it from passing any water down below Tri-State Dam. Obviously, at the time when the Warren Act contracts for these four canals were entered into the United States believed that the local supplies were insufficient. Likewise, the irrigation districts involved must have believed that they needed storage water to supplement their natural flow rights. The United States has received large sums of money based upon that understanding and that guarantee.

There is no proposal that the United States refund any money either to these four irrigation districts or to Gering Irrigation District. The most fundamental principles of justice, equity and fair dealing are violated by this proposal.

We can perceive no justification either in law or in equity for the proposal. The United States in its brief, on pages 205 to 206, implied that Nebraska might "cir-

cumvent" the allocation and "transfer the ultimate benefits of the storage water" to parties not entitled to them. We wish to assure the court that Nebraska will proceed always in accordance with the applicable law which is, of course, the law of Nebraska. These laws have not been changed in any substantial particular since the Warren Act contracts were entered into, and they were obviously considered and contemplated as a part of those contracts. Nebraska will never attempt "to circumvent" any decree of this court, although the United States apparently asks for the assistance of this court in circumventing its solemn contracts.

We are aware that the opposing parties will probably contend that our argument from *Wyoming* v. *Colorado*, 309 U. S. 572, 84 L. Ed. 954, is inconsistent with our position where we seek a distribution by priorities interstate. However, the proposal for distribution by priorities interstate is directly parallel to and consistent with the laws of the respective states and in enforcement of those laws. The proposal of the United States is an attempt to interfere with Nebraska rules of priority and to force Nebraska to give water to a junior which has a Warren Act contract in preference to seniors who do not, with the obvious and even avowed purpose of making that water available instead for the still more junior Wyoming project (the Kendrick). This is definitely stated on page 206 of the brief filed on behalf of the United States.

Moreover, the alternative proposal of Nebraska, found on pages 63 to 66 of Nebraska's initial brief, would eliminate all such questions of this court interfering with state distribution of the allotment of water given to that

state. We refer the court to the table at the bottom of page 64 of Nebraska's initial brief. Wyoming would get the first 103 second-feet of natural flow available in the Whalen to Tri-State Dam section. Wyoming could distribute that water to any appropriators which their law found to be entitled to it. Since Nebraska would get the next 924 second-feet, Nebraska would have a corresponding privilege of the distribution of that amount, and this process would be repeated with each of the "blocks" of supply. This would be entirely consistent with the *Wyoming* v. *Colorado case*, above cited, and would, we believe, eliminate all such objections.

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ANSWER TO BRIEF OF THE STATE OF COLORADO.

Introductory.

The brief of the State of Colorado is chiefly directed to its demand that the suit be dismissed, so far as concerns the State of Colorado. It has little conflict, except in that respect, with the theories and contentions of the State of Nebraska and, therefore, does not require any great amount of attention in this brief. However, while it seems to seek principally a dismissal so far as concerns the State of Colorado, it to some extent also implies that the court should dismiss the entire suit.

I.

Colorado's Contention That the Suit Should be Dismissed As To It.

It is true, as stated by counsel for Colorado (p. 5), that Nebraska did not make Colorado a party and that this court did not, on Wyoming's motion, consider Colorado an indispensable party to the suit (*Nebraska* v. *Wyoming*, 295 U. S. 40). Nebraska did not, by any amendment to its bill of complaint, assert any rights against Colorado, although in answer to Colorado's cross bill, Nebraska took issue with Colorado's allegations and this formed a definite issue between the two states.

Colorado's position, in view of the fact that she has filed a cross bill which still stands as a part of the pleadings in this case, is to say the least peculiar. Colorado apparently still insists that this court make to Colorado

an equitable apportionment of the waters of the stream as prayed in her cross bill, but at the same time asks the court to dismiss Wyoming's cross complaint against Colorado and any assertions made in the pleadings by the United States and Nebraska as against Colorado's claims. If Colorado were serious about wishing the entire suit to be dismissed, it would be a relatively simple matter to obtain permission from this court to amend its pleadings and dismiss its cross bill. This has not been done.

The argument made on this behalf is not merely a technical question of pleading which in this type of suit might well be disregarded. It is fundamental in that Nebraska and the other parties to this case are still subjected to claims and demands made by Colorado while Colorado insists that all other claims and demands must be dismissed.

II.

Colorado's Suggestion as to Dismissal of the Entire Suit.

Implicit in the argument in Colorado's brief, pages 15 to 40, is the suggestion that the entire suit should be dismissed and not merely as against Colorado. This, of course, is fundamental in the entire case. However, we believe that this argument has already been anticipated, and we refer the court to the first 27 pages of our initial brief wherein we believe this matter is answered.

III.

The Effect of Increased Irrigated Acreage in the Downstream States.

In pages 22 to 26 of the Colorado brief, it is argued that proof of the fact that Colorado has not damaged

Nebraska lies in the fact that acreage in Nebraska has increased.

It should be remembered that Nebraska is not contending that practices prior to 1930 created any damage to Nebraska. Hence, Colorado's contentions must relate solely to the period from 1930 to 1939. It should be noted from the table at the top of page 23 of Colorado's brief that Colorado contends only that Nebraska irrigated acreage increased by 12,000 acres during that period. It is further to be noted that this table, coming as it does from page 29 of the Master's Report, includes Nebraska's entire irrigated acreage from the North Platte and Platte which includes a large area below Bridgeport. There is nothing to show from the Master's Report or from Colorado's argument whether this 12,000 increase of acreage was above or below Bridgeport, and it must be remembered that Nebraska concedes that the irrigated area below Bridgeport does not require water from Wyoming.

The Master's Report (p. 88), using the census figures used by Colorado, shows for Morrill and Scottsbluff Counties, Nebraska, for 1929, 281,122 acres irrigated. The comparable 1939 figures are given in United States' Exhibit 204D, and show for the same two counties 280,430 acres for 1939. Thus in the area here involved there was a slight decrease instead of an increase.

On page 24 it is contended that the construction of the Tri-County Project in Nebraska for the irrigation of 205,000 acres evidences ample water supply in Nebraska. It must be noted that this project lies far below Bridgeport, and its commencement is at the Kingsley Reservoir which, on the map in the Master's Report

opposite page 19, is shown to lie at the dividing point between Subsection 3a and 3b of the divisions made by the Master of the river area. It is approximately 90 miles downstream from Bridgeport, and, therefore, even in its upper portion, is entirely outside of the area wherein Nebraska claims to have been damaged. Its diversion point for irrigation is 140 miles below Bridgeport, and most of the irrigated land lies two hundred miles downstream from Bridgeport.

The argument is further made, on page 24, that the construction of the Kendrick Project in Wyoming during the pendency of this suit proves that there is an unused supply of water in the North Platte. However, this is an *a priori* argument which is based upon the theory that the persons in the Bureau of Reclamation who planned the project have infallible wisdom. It is abundantly demonstrated that since 1930, there has been no water which would have been available for the Kendrick Project, and this is conceded by all parties. Such *a priori* arguments as this one made by Colorado must certainly yield to the stubborn facts existing in this case.

IV.

The Argument as to the "Abnormal Drouth Condition."

Pages 41 to 46 of Colorado's brief argue that the Master's recommendation is made on the basis of an "abnormal drouth condition," and that, therefore, the recommendation must fail. The term "abnormal" is an epithet applied solely by counsel for Colorado. As pointed out in Nebraska's initial brief, it can hardly be said that a condition which has been experienced continuously for fourteen out of forty years of record or for

more than one-third of the time is abnormal. When in addition it is shown as it is by the graph on page 25 of the Master's Report, that at least six other years in the first twenty-six years of the period had flows comparable to those of the last fourteen years, it becomes clear that the so-called "drouth conditions" occurred in at least fifty per cent of the years of record and continuously for a period of more than one-third of the years of record.

The question of abnormality is one of definition. We contend that there is no such record to establish as yet what might be called a "norm" or usual flow of the stream. The thousands of years that are and must be included in the geologic era, since the geography of the North Platte Basin reached its present condition, are silent as to what is the usual flow of the stream except for the last forty years. We contend that the experience of the last fourteen years must necessarily be taken into account in establishing a dependable flow, and this the Master properly did.

V.

The Effect of the Act of August 9, 1937.

On pages 50 to 52, counsel for Colorado argues that the decree is erroneous because the act of August 9, 1937 (50 Statutes 595) provides that the construction, maintenance and operation of the Kendrick Project must never interfere with present vested rights in Jackson County, Colorado, for the use of the waters of the North Platte River.

This argument is untenable. In the first place, the Master's decree recognizes all existing present uses in

Jackson County and recommends that no interference be made with them.

In the second place, the Master's limitation upon further development in North Park is not based upon protection of Kendrick but rather upon protection of Pathfinder and other existing uses below, including the Whalen Tri-State Dam section. We refer the court to the Master's Report, pages 126 to 128, in which it is pointed out that at least 30,000 acre-feet of existing uses in Jackson County are in violation of the priorities of the Pathfinder Reservoir, thus creating a damage to Nebraska users in those seasons when there is insufficient water to fill Pathfinder. The Master felt apparently that it was not equitable to disturb those existing uses but did recommend that no later and junior uses should be permitted which might interfere with the Pathfinder rights and the rights of downstream irrigators in Wyoming and Nebraska by a diminution in their water supply through such increased development in Jackson County.

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ANSWER TO BRIEF OF THE STATE OF WYOMING.

Introductory.

Before making any detailed answer of specific portions of Wyoming's brief, we wish first to discuss certain fundamental assumptions made by counsel for Wyoming which we believe are inadmissible, but which are basic to the entire argument of the State of Wyoming. If our contention is correct, much of the detailed assertions in Wyoming's brief becomes untenable and can be disregarded.

These assumptions will be discussed under three heads. First, the assumption that storage rights on the North Platte River, whether in Wyoming or Nebraska, must be disregarded and all water furnished indiscriminately to all appropriators. This assumption includes the assumption not only that natural flow appropriators having no legally recognized storage rights are entitled to storage water but also that appropriators whose storage rights attach only to one reservoir (Seminoe, for example) are also entitled to any storage water that may be flowing in the river regardless of whether or not it is Seminoe or Pathfinder water. The Wyoming assumption further disregards all priority rights to natural flow and allows the most junior appropriator on the river (the Casper-Alcova Irrigation District), with a priority of 1934, to divert natural flow water on an exact parity with the most senior, the Grattan in Wyoming (with a priority of 1882) or the Tri-State in Nebraska (with a priority of 1887). Second, the second assumption made is that

exactly the same sequence of wet and dry years will again occur so that a fourteen year period of insufficient water supply will again be preceded by a ten year period of excessive water supply. Third, the assumption is made that records prior to 1904 and going back to 1895 may be used to establish past history of the flow of the river.

Following the discussion separately of each of these assumptions we will discuss certain detailed portions of Wyoming's brief calling attention to errors and unsound arguments with which we wish to take issue.

I.

The Disregard of Legal Rights on the River Including Disregard of Separate Storage Rights.

A.

THE NATURE OF STORAGE RIGHTS.

At the risk of restating elementary matters, we believe we should give the court some explanation of the nature of storage rights and the rationale behind them. These matters have already to some extent been discussed in the Master's Report and in briefs previously filed, but we believe that it will assist the court if a brief description is here given of the purpose and practical operation of storage reservoirs.

It has been the history of irrigation throughout the western portion of the United States that the earliest appropriators usually find sufficient flow in the stream in its natural state (called natural flow) so that the needs of the lands which require the water are satisfied without artificial readjustment of the flow. Thus the

oldest appropriators rely principally on this natural flow. As the irrigation uses increase upon any stream, it is found that the dependable natural flow throughout the irrigation season is insufficient to supply all of the needs. It is also found that considerable quantites of water pass down the natural channel of the stream in the winter season when irrigation uses of the water cannot be made and likewise at some portions of the irrigation season, more water passes down than is currently needed. The natural flow uses are limited to those which can be supplied by the dependable flow throughout the season and, in effect, are limited to the lower flows as they occur, usually in July and August.

Winter flows and excess summer flows can be held back in reservoirs and made available at the time when they are needed. These reservoirs are, however, naturally expensive, especially when they control large quantities of water. Some method must be found by which the cost of the reservoir can be recouped. Moreover, the reservoirs must be operated and maintained and annually a certain amount expended for that purpose.

In most of the western states, including Wyoming and Nebraska, it has been considered just and equitable that these costs should ultimately be paid by the water users who are the beneficiaries of the additional supplies made available. In some instances, it is found practicable and feasible to create the storage through a multiple purpose dam by which some of the water can be used for power development, and the power revenues used to defray a part of the costs. This is the case in connection both with the Seminoe and Guernsey Dams on the North Platte River. While on some other streams, flood control

is sometimes also added to the purposes of the dams, this does not enter into our North Platte problem and may be disregarded.

The Pathfinder Reservoir has no power development directly connected with it, although some of the water which has previously been stored in Pathfinder is used in developing power at Guernsey Dam and in the Lingle Power Plant, which is a part of the Fort Laramie canal system. Even in those instances where the dam is directly used for power purposes, but the water impounded behind it is also used for irrigation, it is considered inequitable to attempt to make the power revenues bear the whole cost and in fact, it is sometimes economically impossible to do so, because the electric power produced is in competition with power produced by other means such as steam and diesel engines.

The method used by which water users are ultimately charged for the benefits received by them from the storage reservoirs is almost identical in Nebraska and Wyoming. The method provided by the respective statutes is to allow reservoir appropriations to be made by the individual corporation or government agency which is intending to construct and operate the reservoir. Such an appropriation is made by filing with the state department as in the case of a natural flow appropriation and takes its priority in accordance with the same procedure. After the reservoir is constructed "secondary permits" are issued allowing the use of that water in accordance with the direction of the owner of the reservoir. That owner is permitted to contract with water users to supply storage water either on a permanent basis or on an annual basis upon such terms as may be agreed upon. These

terms are, however, subject to the overriding power of the states to protect water users against exorbitant charges and to prevent the owner of the reservoir who has obtained a monopoly of a natural resource from exploiting that monopoly and making an unreasonable profit out of it.

The statutes of both states permit the delivery of the storage water in the natural channel of the stream by forbidding the diversion of the storage water so transmitted by anyone who has not acquired a right to it by having made arrangements with the owner of the reservoir and paid the charges.

In the absence of some such system, no construction of reservoirs would be possible. Some reservoirs have been constructed upon the streams by the investment of private capital, although the largest projects are beyond financing privately, and most of the largest reservoirs are constructed either by a government agency such as the Bureau of Reclamation or by a public corporation publicly controlled.

In all such instances it is still expected that the cost will be ultimately borne by the water users through the system of requiring the water user ultimately to pay to the corporation or other agency which has expended the money, a reasonable charge for the service rendered in making the water available.

Thus the storage water, once it has been impounded pursuant to the appropriation and within the priority assigned to that appropriation, comes under the control of the owner of the reservoir. The repayment to that owner of the costs naturally depends upon its compliance with its contract and depends on its ability to make

that storage water available to the water user. As above stated, this is usually done by transmitting it down the natural channel of the stream to the headgate of the irrigation canal from which the water user draws his water. The success of the entire system depends upon the segregation of the storage from the natural flow and upon the ability of the owner of the reservoir to comply with his contract by furnishing such water to the water user after it is so segregated.

Since no method has yet been discovered of preserving the identity of the storage water once it is released into the stream and allowed to mingle with the natural flow, the segregation is accomplished by bookkeeping. A determination is made as to the respective quantities of natural flow and storage at the point where they are mingled, and at various points on the stream determination is made as to the quantity of storage water in the stream at that point. This determination is made by the deduction of such quantity of storage water as has been diverted above the particular point, and an allowance for transmission losses including seepage, evaporation, etc. The method has been used for many years on the North Platte with a reasonable degree of success, and this is described in Mr. Gleason's testimony which is printed in the appendix to the Wyoming Brief (Rec. pp. 27,979-28,008 and 28,021-28,029).

B.

THE WYOMING STATUTE AND ADMINISTRATIVE ORDERS AS TO STORAGE WATER.

The Wyoming Revised Statutes of 1931, in Chapter 122, Articles 15 and 16, contain a complete statement

of the rights which can be acquired and the procedure therefor. Section 122-1501 provides for an application for a secondary permit. The applicant must show that he has entered into an agreement with the owners of a reservoir for a permanent and sufficient interest in the reservoir to impound enough water for the purposes set forth in the application. When beneficial use has been completed and perfected under the secondary permit, proof is to be made and a certificate of appropriation is to be issued describing both the ditch and the reservoir.

Section 122-1502 provides for application and permit for construction of a reservoir.

Section 122-1503 gives to persons having rights in ditches the right to carry storage water through the ditch. The right is further extended to the owner, manager, or lessee of a reservoir who desires to use the ditch in carrying water through such ditch for the benefit of any such person.

Section 122-1504 provides for the use of the bed of a stream or other watercourse for carrying stored or impounded water from the reservoir to the consumer thereof or for the benefit of any person having the right to use such reservoir water. When such water is so being carried the water commissioner is to be notified. It is then his duty "to so adjust the headgates of all ditches of ditch companies or appropriators from the stream or watercourse, and the division boxes of individual consumers of water, not entitled to the use of such stored water, as will enable those having the right to secure the volume of water to which they are entitled." In other words, it is mandatory that the water commissioner must prevent those not having storage rights from encroaching

upon the supply of storage water which is being carried in the bed of the stream or the watercourse. Wyoming is asking this court to repeal that law insofar as it might apply to the North Platte River below Alcova and to require the water commissioners in Wyoming to act in violation of the Wyoming statutes.

Section 122-1508 provides that the use of water stored under the provisions of the Wyoming statute may be required under such terms as shall be agreed upon by and between the parties in interest. Lands entitled to the use of water of any reservoir may use the water stored therein and to which they are entitled at such times and in such amounts as the water users may elect provided that a beneficial use of the water is made at all times.

Section 122-1601 makes the owner of a reservoir the owner of a right to impound the water and the right to sell or lease a portion or all of his right to the impounded waters.

Section 122-1602 relates to the matter of water rights in stored water as attaching or becoming appurtenant to lands, providing that this may be done by deed.

Section 122-1603 provides that the owner of the reservoir must furnish to the water commissioner a list or lists of the parties entitled to use the water from the reservoir.

Section 122-1604 governs the execution and filing of deeds and leases of reservoir water and water rights.

A comprehensive system governing reservoir waters is thus provided for by the Wyoming statutes. It pro-

vides clearly for individual ownership of rights in storage water, which rights can be made the subject of transfer and of sale. Particularly is it made clear by Section 122-1601 that the owner of the reservoir is the owner of the right to the impounded water and the right to sell or lease a portion or all of his right in the impounded water. It is further made clear by Section 122-1504 that it is the duty of the Wyoming officials to protect the rights of the owners of storage water which is being carried in the bed of the stream against encroachments by persons not entitled to the use of such storage water. Wyoming's proposal of distribution of the waters of this stream with one stroke of the pen wipes out all of these rights. The owner of the Pathfinder Reservoir no longer is the owner of the right to the use of the impounded water and no longer can sell or lease that right to use. Persons with secondary permits issued in accordance with Section 122-1501 no longer have the right to the waters contained in the reservoir. Persons to whom the United States has sold rights to the use of the storage water of the Pathfinder Reservoir no longer are protected by the Wyoming state officials against encroachments by those who have acquired no storage rights. Although these water users have spent large sums of money in purchasing rights from the United States, they no longer have the protection which the Wyoming statute guaranteed them when they made their purchase, and they no longer have the right guaranteed by Section 122-1508 to control the time of use of their storage waters.

The record here abounds in evidence showing that the United States has complied with the Wyoming statute, and that the Wyoming authorities have issued secondary

permits and certificates of appropriation evidencing rights in the storage of Pathfinder and the other reservoirs in Wyoming on the North Platte River. Secondary permits for Pathfinder water were issued to cover the Fort Laramie Canal (Goshen Irrigation District and Gering-Fort Laramie Irrigation District) (U. S. Exhibit 17). Likewise, secondary permits for Pathfinder water were issued for the Interstate Canal (Lingle and Hill and Pathfinder Irrigation District), and for the Northport Canal (U. S. Exhibit 11). Similar secondary permits were issued for Guernsey storage water for the Fort Laramie Canal (U. S. Exhibit 26), for Interstate Canal (U. S. Exhibit 24), and for the Northport Canal (U. S. Exhibit 25). Adjudications and certificates of appropriation were likewise issued for the use of such storage water on such lands (Neb. Exhibits 571-572 for Pathfinder Irr. Dist.; Neb. Exhibits 576-577 for Northport Irr. Dist.; Wyo. Exhibits 7-8 for Goshen Irr. Dist.).

Secondary permits have been issued covering storage water in Alcova Reservoir (U. S. Exhibit 32), and in Seminoe Reservoir (U. S. Exhibit 33).

Similar adjudications, certificates of appropriation, etc., have been made and issued by the appropriate Wyoming authorities, but since they are not printed in the record, no specific reference to them is here made.

We might use the Interstate Canal at this point as an illustration. For use on lands both in Wyoming and Nebraska, Wyoming has issued primary permits for direct flow water and secondary permits for Pathfinder and Guernsey water. These have ripened into adjudicated rights and certificates of appropriation for use both on Nebraska and Wyoming lands and have been issued

with all the authority possible by the State of Wyoming. In a sense it might almost be said that these rise to the dignity of patents to real estate issued by the United States general land office. The Wyoming statutes, above cited, purport to guarantee storage water rights of these lands in Pathfinder and Guernsey storage waters at any rate to the extent that Wyoming officials must protect that storage water as it passes down the bed of the stream against adverse diversions by appropriators not having storage rights. According to Wyoming law, when storage water is released from Pathfinder to go to the Interstate Canal it is sacred from diversion by intervening canals having no storage rights. Similarly, while that storage water is in Pathfinder Reservoir, it, together with storage water dedicated to other water users having rights in the Pathfinder, is protected by Wyoming law against the demands of canals not enjoying rights in the Pathfinder.

The Wyoming assumption, however, is that storage water must be released regardless of the wishes of those owning storage rights and regardless of whether it will be used by them or by canals which legally are supposed to rely upon direct flow. Once released this storage water may be taken by anyone the same as though it were direct flow. In time of shortage the Interstate Canal must prorate its storage water with others having no rights in Pathfinder, such as the Douglas Canal above Whalen or the Torrington Canal below. The property rights which Wyoming law has created are treated by counsel for Wyoming as a nullity whether those property rights are to be enjoyed in Nebraska or in Wyoming.

In referring to Wyoming law we do not wish to be understood as contending that Wyoming law is binding

on this court where it is or might be hostile to the principles of an equitable apportionment between Wyoming and Nebraska. We do contend, however, that in this litigation Wyoming is bound by her own law. We contend that counsel for Wyoming cannot claim for Wyoming appropriators a better position than that created for them by their own laws. Where Wyoming law and Wyoming administrative action pursuant thereto have created rights in Nebraska land to waters stored in Wyoming and where those Wyoming laws have guaranteed that protection, we contend that counsel for Wyoming are not in a position to ask this court to destroy those rights and to withdraw from those lands the protection provided for by Wyoming statute.

Thus Wyoming is, as we contend, estopped by her own laws and the acts of her administrative officials, pursuant to those laws, to ask the aid of this court in abrogating those rights and in distributing storage water in a manner inconsistent with such rights.

It is astounding to find that the State of Wyoming now repudiates her own statutes and the acts of her officials done pursuant to those statutes. Storage water which is solemnly dedicated to the uses specified in the permits and the certificates of appropriation is now to be taken without due process of law and without compensation. Such storage water is seized by the State of Wyoming and used as a part of its scheme to furnish a supply for the Casper-Alcova or Kendrick Project in which no settlers yet have any vested rights and which as yet has no water users, for whose interests protection might be sought.

C.

NEBRASKA'S LAWS AS TO STORAGE WATER.

Since the storage reservoirs, whose storage water is in controversy in this litigation, are all in Wyoming, the Nebraska laws do not have so much importance. The principal Nebraska uses of storage water above Kingsley Reservoir are in the Pathfinder Irrigation District and Gering-Fort Laramie Irrigation District, both diverting at Whalen, Wyoming, and in the Farmers Irrigation District (Tri-State Canal), Northport Irrigation District and Gering Irrigation District, all diverting within a mile below the state line. Thus Wyoming laws and Wyoming administrative control govern the transmission of such storage water so used in Nebraska. Since, however, four Warren Act contractors (Central, Chimney Rock, Beerline and Browns Creek) divert below the Tri-State Dam, it is important to note that Nebraska affords corresponding protection to the storage water destined for those Warren Act contractors corresponding to that protection which is afforded by the Wyoming law to the Nebraska storage rights previously listed. The Master's Report, page 190, lists these four Warren Act contractors and the amounts guaranteed to be delivered to them under their contracts.

As above stated, the Nebraska laws governing storage water are very closely parallel to the Wyoming laws and provide for practically the same procedure and the same protection to storage water while it is in the natural channel of a stream.

Section 46-241, Neb. Rev. Stat., 1943 (Sec. 46-617, Comp. Stat., 1929), provides for the procedure upon the

application for a water supply for a storage reservoir. This procedure is, so far as practical, the same as for the filing for a natural flow right for an irrigation canal as described in the Master's Report, pages 14 to 15.

Section 46-242, Rev. Stat., 1943 (Sec. 46-617, Comp. Stat. 1929), provides for an application for a permit to apply to beneficial use the water stored and gives the owner a preferred right for a six months period after the completion of the reservoir and requires any other person making an application within that time to so show by documentary evidence that he has secured sufficient interest in such storage reservoir to entitle him to enough water for the purpose set forth in the application. This parallels the situation for an application for a secondary permit.

Section 46-252, Rev. Stat. 1943 (Sec. 46-608, Comp. Stat. for 1929), provides that storage water may be conducted along natural channels and withdrawn by the person entitled to the use of such water at any point without regard to prior appropriations, making due allowance for evaporation and seepage, to be determined by the Nebraska Department of Roads and Irrigation.

Section 46-254, Rev. Stat , 1943 (Sec. 46-610, Comp. Stat. 1929), forbids the taking of any water from a stream, reservoir or other source without authority and provides a criminal penalty. This parallels the protection afforded as above described by the Wyoming statute.

In addition to the above referred to sections, Section 46-273, Rev. Stat. 1943 (Sec. 46-628, Comp. Stat. 1929), gives specific authority to the United States to store

water pursuant to the Reclamation Act (Act of Congress June 17, 1902, 32 Stat. 388), and authorizes the United States, and every person contracting with the United States for the use of the stored water, to conduct the water into and along any of the natural streams of the state with the same proviso as above referred to in Section 46-252, Rev. Stat. 1943.

Thus it is clear that the Wyoming assumption that storage rights can be ignored directly conflicts with the laws of Wyoming and of Nebraska, and if the decree of this court should operate on the Bureau of Reclamation so as to require it to disregard storage rights, this would be in violation of the provisions of Section 8 of the Reclamation Act requiring the Secretary of the Interior "to proceed according to state laws."

D.

THE PROPOSED JOINT OPERATION OF THE RESERVOIRS.

Under this heading the Wyoming brief, pages 57 to 60, suggests that regardless of the separate priority dates (which Wyoming concedes), and that regardless of the Wyoming laws which require the separation of the rights and the segregation of the storage water in accordance with those rights, water from any of the reservoirs might be supplied indiscriminately to water users under either project. (We presume that the Guernsey Reservoir is excepted from this proposed operation since it lies approximately 200 miles downstream upon the diversion point for the irrigation under the Kendrick Project, and, therefore, Guernsey water could not be used on the Casper-Alcova Irrigation District, at least, by any gravity method of delivery.) It must further be noted that

through administrative decrees made by the Wyoming Board of Control, pursuant to Wyoming law, rights of specific lands to waters of specific storage reservoirs have been adjudicated and, likewise, pursuant to Wyoming laws, certificates of appropriation showing these storage water rights to be appurtenant to specific lands, have been issued by the solemn act of the State of Wyoming. Wyoming now asks the court to eliminate the protection which the Master recommends should be given to the separate storage rights of the Nebraska users of Pathfinder storage, and leave Wyoming free to disregard those rights. The Master's recommendation is needed to protect Nebraska from the threatened Wyoming encroachment.

It should further be noted that Wyoming alone of the interested parties favors such joint operation. It is pointed out, on page 60 of the Wyoming brief, that the United States did propose what Wyoming contends was "a feasible plan for joint operation" and reference is made to the United States' Exhibit 265. It must be noted that the United States apparently now abandons any such plan and does not suggest either by its exceptions or its brief that the Master was in error in his recommendation (Master's Report, pp. 143-145) that the plan of joint operation is improper and not allowable as a matter of law. The only proposal now being made by the United States is that contained in Section VIII of its brief (pp. 207-209) that joint operation should be permitted if and when the water users concerned can come to an agreement upon it. Thus, Wyoming stands alone in wishing to have freedom to operate the reservoirs jointly and, as we believe, Wyoming is estopped by her own statutes and her own records from any such action.

E.

THE PORTIONS OF WYOMING'S BRIEF BASED UPON DISREGARD OF STORAGE RIGHTS.

Almost in the entire brief filed on behalf of the State of Wyoming, the fundamental assumption is made that storage rights are to be disregarded. If the court agrees with our contentions, the fundamental basis of the Wyoming brief is demolished. We would wish, however, to point out that pages 13 to 31, pages 31 to 40, pages 60 to 67, and pages 77 to 80, are all based upon this assumption. Pages 40 to 60 are devoted to argument that this method of operation so assumed is justified and is equitable. We will deal with these arguments at a later point in this brief. Throughout the entire proposal for a decree, pages 82 to 84, the proposed decree is based, so far as concerns operations in Wyoming and Nebraska, upon complete disregard of storage rights and this necessarily follows with the remainder of the brief, pages 84 to 102, in which the attempt is made to justify the proposals made on pages 83 to 84.

F.

THE DISREGARD OF STORAGE RIGHTS WILL CREATE ENDLESS CONFUSION AND LITIGATION ON THE PART OF INDIVIDUAL APPROPRIATORS IN THEIR ASSERTION OF RIGHTS UNDER STATE LAW.

Repeatedly in Wyoming's brief, the assertion is made that the decree of this court should not control individual appropriation rights in the respective states (pp. 31-37, 99-101, Wyoming Brief). We, therefore, assume that Wyoming's own proposals now being made in her initial

brief filed in this court proceed, likewise, upon the theory that individual appropriation rights are left free to assert those rights in the same way as happened in Colorado in relation to the interpretation of the Laramie River decree in the case of *Wyoming* v. *Colorado*, 259 U. S. 419, 66 L. Ed. 999. It will be recalled that in a subsequent phase of the case of *Wyoming* v. *Colorado*, decided under that name, 309 U. S. 572, 84 L. Ed. 954, it was recited that in the Colorado state courts, in the case of *Benziger* v. *Water Supply and Storage Company*, the Colorado state courts had made a distribution of the water apportioned to Colorado in the Laramie River case, which apportionment differed from that made by this court in the original decree. This court sustained the distribution made in *Benziger* v. *Water Supply and Storage Company*, and Wyoming, at pages 31 to 33 of its initial brief, asserts that principle as controlling in the instant case.

Applying the principle which Wyoming itself contends is the only sound principle and which this court has approved, we can foresee litigation by individual appropriators or irrigation districts in Wyoming in an attempt to enforce the rights guaranteed to them under the Wyoming constitution and statutes and under the water adjudications of the Wyoming Board of Control and the certificates of appropriation issued by the Board of Control. For example, the Goshen Irrigation District, or a water user in such district having a certificate of appropriation giving it storage rights in the Pathfinder Reservoir, will find that the supply in the Pathfinder in which the Goshen Irrigation District and its water users have rights, will be depleted by the use of Pathfinder storage water on the Casper-Alcova Irrigation District or some

private project lying between Alcova and Whalen, such as the Douglas Irrigation District. This, of course, will be a clear violation of Section 122-1504, Wyoming Revised Statutes 1931, cited supra, which requires the Wyoming water commissioner to prevent irrigators under the Casper-Alcova Irrigation District or the Douglas Irrigation District from diverting any Pathfinder storage water. It cannot be doubted but that a suit on behalf of the Goshen Irrigation District or of its individual water users to prevent such encroachment on Pathfinder supply would be successful. Wyoming cannot, by the action of its counsel in making such proposal in this litigation, confer upon the Casper-Alcova Irrigation District (which would have rights only in the Alcova and Seminoe Reservoirs) rights in the Pathfinder. Similarly, such rights in the Pathfinder cannot be conferred by this litigation on the Douglas Irrigation District which has only natural flow rights and no rights in any of the storage reservoirs.

Wyoming, by its Supreme Court decision in the case of *Willey* v. *Decker*, 11 Wyo. 496, has announced the rule of law to prevail in Wyoming that a water user from an interstate stream having rights to water stored or diverted in Wyoming for use on land in another state can successfully assert those rights in the Wyoming courts as against Wyoming appropriators and the Wyoming irrigation authorities. This is likewise the doctrine of this court (*Weiland* v. *Pioneer Irrigation Company*, 259 U. S. 498, 56 L. Ed. 1027). Therefore, the Northport Irrigation District in Nebraska or a water user under the Northport Irrigation District could bring a similar suit in protection of its rights to Pathfinder water and protection of Pathfinder storage water from its wrongful diversion. It will be remembered that the

Northport Irrigation District has rights adjudicated by the Wyoming Board of Control to Pathfinder water, and that certificates of appropriation have been issued to the landowners supplied by the Northport Irrigation District, which certificates give rights in water of the Pathfinder Reservoir (Neb. Exhibits 576-577). We, therefore, respectfully submit that Wyoming's proposal, if adopted by this court, must inevitably lead to endless litigation, and that following such litigation the proceedings in this case must again be brought before this court for a revision of the decree in the light of the result of that litigation.

G.

THE WYOMING OBJECTIONS TO SEGREGATION OF STORAGE.

As above stated, Wyoming's brief, pages 40 to 57, objects to the segregation of natural flow and storage and, on pages 57 to 60, objects to the segregation and recommendation of separate rights in North Platte storage and Kendrick storage. As we analyze these objections, they are to be classified under three heads: First, Wyoming claims that segregation is impossible; second, that the contracts made by the United States do not require the segregation, and third, that the contracts cannot override the power of this court to distribute water. We will discuss them under these three heads.

1.

The Claim of Impossibility of Segregation.

Wyoming apparently lays chief stress upon this contention. It is discussed on pages 40 to 47 of Wyoming's brief and frequently referred to again on pages 47 to 60.

In support of this contention, extracts are given in the appendix (Wyoming Appendix, pp. 42-66) from the testimony of C. F. Gleason, superintendent of power of the North Platte Project in charge of the power system and storage of water and diversion works of the North Platte Project (Rec. pp. 27979-28029). The contention made by Wyoming is that Mr. Gleason was the only witness on the subject (Wyoming Brief, p. 43), and that he demonstrated the practical impossibility of such segregation.

We contend that Wyoming draws the wrong conclusion from this testimony. It is true that (Rec. p. 28029) he concedes that he has not found any entirely satisfactory way of making the determination and has not found any rigid formula that would fit. He does, however, say, "I believe that we arrived at a figure that is correct enough for administrative purposes." As he further explains, on the same page (Rec. p. 28028), all hydrographic records are inaccurate to a varying extent, and an error of ten second-feet in 500 is inevitable. It must be remembered that flowing water in such vast quantities as are herein dealt with cannot be measured or segregated to the last gallon. It must be remembered that an acre-foot contains approximately 327,000 gallons, and that we are dealing in this litigation with not only thousands and hundreds of thousands of acre-feet, but actually with millions of acre-feet. This situation is recognized by all of the water administrators, and it is not claimed that in any instance does the distribution of water operate with such accuracy that every irrigator gets every gallon to which he is entitled, or that no irrigator gets a single gallon more than the law allows him to have. Moreover, the errors made frequently compensate for each other.

Concededly, water has been distributed for many years upon the basis of segregation of Pathfinder and Guernsey storage from the natural flow. Formulae have been evolved and revised by mutual agreement. Wyoming administrators have agreed with some formulae and by tacit consent have allowed others to operate. We do not contend that the distribution of water as between storage and natural flow appropriators has at all times operated without disagreement. Such disagreements have, however, been resolved and distribution has been made amicably and with reasonable accuracy. We do not know what has led counsel for Wyoming to the conclusion that Wyoming statutes are impossible of application or that the Wyoming law requires the Wyoming Irrigation Department to perform an impossible task. We would suggest that if the impossibility actually exists, the situation should be called to the attention of the Wyoming legislature, and that legislature requested to repeal the Wyoming laws, above cited, or at least amend them so that they will no longer purport to apply to the storage water herein involved. No doubt if the impossibility can be or could have been demonstrated, the Wyoming legislature would have made such repeal. Certainly, administration for many years in an attempt to segregate storage from natural flow, and the studies made by Wyoming attorneys and engineers for this litigation, have sufficiently challenged the attention of interested Wyoming parties including the Wyoming legislature, so that the repeal would have been accomplished if operation under the law was actually impossible. Certainly, the Master in this litigation, after careful study of the entire record, did not consider that the Wyoming arguments in this respect were convincing.

2.

The Claim That the Contracts as to Storage Water Do Not Require Segregation.

The above claim is made on pages 45 to 47 of Wyoming's brief. It is there contended that the contracts in question, both with the irrigation districts under the North Platte Project, and the Warren Act contracts with other districts, do not require that storage water be separated from natural flow.

It is true also that in these contracts the United States does not in express terms undertake to segregate the storage water from natural flow water. It is likewise true that the contracts, in referring to the total amount of water to which the districts will be entitled, refer to storage and natural flow alike, and that the Gering-Fort Laramie contract (Neb. Exhibit 567) provides that the United States will divert at Whalen Dam all stored water and all other water to which the lands of the district may be entitled.

However, it is impossible to see how the rights under the contract could be recognized and the contracts complied with by the contracting parties unless stored water could be separately identified at the point of delivery. For example, in the Goshen Irrigation District contract, Wyoming 11-A quoted at the top of page 46 of the Wyoming brief, it is provided that the district "shall have a perpetual right to the annual combined supply of said stored water together with the natural flow of the North Platte River * * * in the quantity annually needed for the irrigation of the district lands." Obviously, this contract gives to the Goshen Irrigation District a guar-

antee that insofar as their natural flow supply (as augmented by other supplies) falls short of supplying their needs, storage water will be supplied. How can a supply of storage water be furnished unless it is known what water is storage and what quantity of it is available? The very use of the term "stored water" or "storage water" indicates that it is a separate category which can be separately identified.

3.

THE ARGUMENT THAT THE CONTRACT PROVISIONS CANNOT DEPRIVE THIS COURT OF THE POWER TO MAKE AN EQUITABLE APPORTIONMENT.

On page 47 and following pages, Wyoming apparently takes the directly opposite and inconsistent position from that which is discussed and contends that, while the contract provisions do require the separation of natural flow and storage, those contract provisions "cannot deprive this court of jurisdiction to make an equitable apportionment between the litigant states." This argument, of course, defeats or wipes out the argument made on the preceding pages that the contracts do not make such a requirement. Disregarding, however, this obvious inconsistency, we will proceed to discuss the argument on its merits as though it did not carry in it the seeds of its own destruction.

The Wyoming argument misconceives Nebraska's contentions and the conclusions reached by the Master. No one at any point contends that any contracts deprive this court of any jurisdiction. In fact, we assert and rely upon the jurisdiction as set forth in the jurisdictional statements of each of the parties in their initial briefs.

Equally, we do not contend that the right to make the contracts in question is based solely upon the Reclamation Act or the Warren Act, although these acts are important as giving authority to the Secretary of the Interior and the officers operating under him in his department to enter into the contracts. However, the contracts derive their true authority and sanction from the Wyoming statutes, above cited, which specifically authorize the owners of reservoirs to enter into contracts for the use of water stored under the provisions of Wyoming statutes. We refer particularly to Sections 122-1501, 122-1508, 122-1601 of Wyoming, Compiled Statutes 1931, discussed supra.

These contracts do not deprive the court of jurisdiction but furnish guides as to how that jurisdiction should be exercised. In other words, when a lawful contract has been made and is before the court, it is mandatory upon that court to enforce the contract if that relief is properly sought and the jurisdiction is properly invoked. We merely ask the court not to impair the obligation of the contracts lawfully entered into, and we seek to prevent this court from taking any action which will impair the vested rights of citizens of the United States in irrigation water where Wyoming has issued to them certificates of appropriation guaranteeing their right to it.

Counsel for Wyoming, on pages 50 and 51 of their brief, contend that delivery of water is subject to state control and to judicial decree. With this contention, we are in entire agreement. We do, however, contend that state control is to be exercised under the laws of that state and that, therefore, the control of the State of Wyoming must be exercised under its laws which grant

protection to storage water. We, likewise, contend that judicial decrees should be in accordance with law and with lawful contracts of the parties. State control is not lawfully at the whim of the Attorney General of the State of Wyoming in his attempt to set aside acts of Wyoming's legislature, nor should a judicial decree disregard lawful contracts and the statutes of the state.

H.

THE DISREGARD OF PRIORITY RIGHTS IN CONNECTION WITH NATURAL FLOW.

Parallel with the disregard of separate storage rights is the assumption made by Wyoming that all natural flow rights are on a parity. The Wyoming brief and the proposals based upon it are in entire disregard of the fact, conceded by all parties to this case and specifically found by the Master, that both in Wyoming and in Nebraska natural flow is distributed on the basis of priority of appropriation. We need not here repeat the discussion on pages 28 to 47 of Nebraska's initial brief. It is enough to say that Wyoming has not disputed the fundamental basis.

At any rate internally, Wyoming admittedly must distribute the water under its control to its senior appropriators in preference to its juniors. Failure to recognize this principle in the decree of this court will inevitably provoke litigation in Wyoming similar to that in *Benziger* v. *Water Supply and Storage Company*, above referred to, which substantially altered the decree in *Wyoming* v. *Colorado*, 259 U. S. 419, 66 L. Ed. 999, and required another original action in this court, *Wyoming* v. *Colorado*, 309 U. S. 572, 84 L. Ed. 954.

It is obvious that the principle of priority, even within Wyoming, is ignored by paragraphs 2 and 3 of Wyoming's proposed decree appearing on page 83 of its brief. There separate allotments of water are given on the one hand to appropriations above Guernsey, and on the other to the Kendrick Project which is lumped with the Wyoming appropriations below Whalen. No allowance is made nor care taken that priorities be recognized.

The Wyoming proposals are still more clearly in disregard of priorities as evidenced by paragraph 6 of the proposed decree on page 84. This provides for proration of shortages as between Wyoming and Nebraska, such proration, however, to be limited to the area below Guernsey plus Kendrick. Apparently, in event of shortage, the area above Guernsey nevertheless receives an amount equal to its full demand regardless of whether the supply is sufficient to furnish other appropriators with water or not.

There is a still further vice in the proposed proration. Under it the Kendrick Project, the most junior project on the river, which is still inchoate in the sense that no water has been applied to beneficial use by irrigation as yet under it, is guaranteed proportionately as favorable treatment as that which is accorded to the oldest appropriators on the stream. The inequity of such a proposal is at once apparent. The result would be to deprive existing developed projects of water which in equity they are entitled to, and to furnish the water so taken away from them to guarantee rights that have not yet completely come into existence. The proposal is well calculated to devastate existing well developed areas with doubtful corresponding benefits.

I.

DISCUSSION OF WYOMING EXHIBIT 176.

It is evident that counsel for Wyoming base their entire argument upon Wyoming Exhibit 176, the operation table prepared by Mr. Nelson, the Wyoming engineer, for the purpose of attempting to demonstrate that the water supply is adequate for the supply of all rights on the river. It is discussed in the Wyoming brief, pages 20 to 27, and is repeatedly thereafter referred to.

Counsel for Wyoming are in error when they state, on page 26 of their brief, that this exhibit is only assailed for the reason that it does not make allowance for sufficient demand of water. On the contrary, Nebraska has at all times attacked it as having any validity or bearing on the problems in this case, because of the disregard of storage rights as against natural flow, disregard of several classes of storage rights as against each other and disregard of priority rights to natural flow. Printed in the appendix is the cross examination of Mr. Nelson on this subject (Rec. pp. 27773-27787) which shows conclusively that the exhibit was based upon these fundamentally false assumptions whose falsity is demonstrated by the foregoing portion of this brief. We most respectfully submit that the entire study and operation table must be disregarded, since it is based upon unreal and impossible conditions, and legally the river can never be operated in the manner which Mr. Nelson assumes for his operation table. We believe that this court will agree that the Master was justified in rejecting this evidence, since it has no bearing on the problem actually before the court.

II.

The Wyoming Unjustified Assumptions as to Future Water Supply.

Another assumption which is basic in the argument of the State of Wyoming and is implicit in Exhibit 176 as well as in the argument proper, is the assumption that exactly the same series of years of water supply will be repeated in the future as it happened from 1904 to 1940, or, at any rate, from 1920 to 1940. Wyoming Exhibit 176 purports to show what would have happened if the Kendrick Project had been imposed on the river in 1904 together with all the other developments subsequent to 1904, including the additional storage capacity created in the Kendrick Project. In addition, the other assumptions as to disregard of different rights were, of course, also applied. The attempt was made to prove that water would have been available on those various assumptions down to a certain date assuming also exactly the supply which historically was available.

This could have meaning in the instant case only if the series of years repeated themselves exactly and in exactly the same order so far as concerns water supply for those years. We particularly refer the court to the fact that carryover storage was made possible only by reason of the fact that in the decade, 1920 to 1929 inclusive, five of the years produced water supplies each greatly in excess of the 1904 to 1930 mean and three additional years practically equalled that mean. In other words, only two of the years (1922 and 1925) were below the mean for 1904 to 1930. The above description of the water supply for that decade is evidenced by the

graph shown on page 25 of the Master's Report. In other words, Wyoming Exhibit 176, Sheet 15, shows that at the commencement of the drouth period of 1930 there would have been, on Mr. Nelson's assumptions, a carry-over storage in the amount of 1,832,900 acre-feet, or a quantity which would be equal to approximately eighty per cent of the combined capacity of the reservoirs in question.

The extraordinary large supply for the decade 1920 to 1929 did in fact occur. We could not dispute that fact even if we wished to do so. We most respectfully urge, however, that the fact that this did occur is no evidence that it will again occur in exactly the same way. Counsel lay great stress (page 31 of Wyoming's brief) upon the theory that what has happened in the past is the best guide to forecast what will probably happen in the future. This is not exactly literally so in the way that counsel attempt to apply it. In connection with natural phenomena, one of the most striking features is the infinite varieties of ways in which the future repeats the past. The fact that in 1917 the flow at Pathfinder was approximately 2,400,000 acre-feet, nearly a million acre-feet in excess of the 1904 to 1930 mean and not far from twice the 1904 to 1940 mean, gives ground for belief that such flow may occur again at some time in the future. The fact that 1929 flow was approximately 1,900,000 acre-feet again gives ground for belief that a similar flow will at some future time occur. Equally, the fact that the 1934 flow was less than 400,000 acre-feet gives ground for belief that this will occur again in the future. None of these conclusions, however, justify the further conclusion that flows will occur in exactly the sequence that they did

occur 1904 to 1940 or even approximately in the same sequence.

Counsel, by assuming that a future drouth period will be preceded by a decade of plentiful supply, contradict their own argument in which they repeatedly imply that never again will we have a sequence of years such as 1930 to 1943.

Mathematically there is an extremely large number of possible permutations of forty different quantities arranged in series. All that the past demonstrates is that someone of those permutations may again occur. We most respectfully submit that the fundamental assumption that this series will again exactly be repeated in the same way is wholly fallacious.

Moreover, sound engineering practice and a genuine attempt to test the validity of conclusions, requires that the test be applied by commencing the drouth series with empty reservoirs. This was the method used in testing the adequacy of the Kingsley Reservoir supply as described by the Master on page 97 of the report. If the same method had been used by Mr. Nelson commencing the operation of the Kendrick Project in October of 1929 with an empty reservoir system instead of one eighty per cent full, the Seminoe Reservoir never could have operated. His Exhibit 176, Sheet 15, shows a decrease of the reservoirs by over 600,000 acre-feet, May to September, 1930, of which 400,000 had been supplied by the preceding winter. Corresponding depletions are made for practically every irrigation year after 1930 in Wyoming Exhibit 176, with the result that without question there never could have been an operation of the Kendrick Project since 1929.

III.

Records Prior to 1904.

A further assumption is made by counsel for Wyoming that the records from 1895 to 1904 can be used as a basis for calculation and computation the same as the records for the period commencing with 1904. That this assumption is fallacious is demonstrated by two facts.

In the first place, as stated in the Wyoming brief, page 19, "1904 is the first year in which the flow of the North Platte at Pathfinder Reservoir was recorded." Since this is the key point used in all water studies including those made by Wyoming and especially Wyoming Exhibit 176, obviously data of extreme importance are wanting.

Moreover, as shown by the testimony of R. I. Meeker, Record, pages 26,212 to 26,214 (printed herewith in the appendix), the records before 1904 are very sketchy and cannot be relied upon to give a fair picture of conditions as they actually existed.

The Master very properly based his analysis of water supply on the record commencing with the year 1904.

IV.

The Wyoming Brief Makes Numerous Faulty and Fallacious Analyses of the Evidence and Particularly of the Water Supply Records.

A.

THE CLAIM THAT ADDITIONAL KENDRICK STORAGE CAPACITY GUARANTEES SEVEN YEARS OPERATION OF THE CASPER-ALCOVA IRRIGATION DISTRICT.

The claim under this head is made at numerous points in the brief, but particularly pages 15 to 16. It is there urged that the combined capacity of the Seminoe and Alcova Reservoirs is 1,216,000 acre-feet and that since consumptive use of the Casper-Alcova District is 162,000 acre-feet, which is less than one-seventh of 1,216,000 acre-feet, the storage capacity would create such a carry-over.

There are several fallacies involved in this computation. In the first place, the gross capacity of 1,216,000 acre-feet as described includes 55,000 acre-feet of dead storage which cannot be used since it must always remain in the Seminoe Reservoir to create a head for the Seminoe Power Plant. This is evidenced by the third sheet of Wyoming Exhibit 35 as printed and by the second sheet as printed of United States Exhibit 265. This means a net storage capacity of 1,161,000 acre-feet.

Moreover, the Casper-Alcova Irrigation District requires at and above the Alcova diversion dam an annual quantity of 208,000 acre-feet instead of 162,000 acre-feet. The figure of 162,000 acre-feet is arrived at, as shown on page 15 of Wyoming's brief, by adding the headgate requirement of 168,000 acre-feet to the evaporation loss on the reservoirs of 40,000 acre-feet, giving the total of 208,000 acre-feet. Then counsel subtract the May to September return flow of 46,000 acre-feet. In doing so, counsel overlook the fact that the return flow must of necessity enter the stream below Alcova Dam and, therefore, would not be available to make up either for the evaporation loss on the reservoirs or for the headgate diversion. In other words, there is no presently known means of making this return flow travel

upstream so that it can either compensate for evaporation loss or be diverted at the headgate of the Casper-Alcova Irrigation District. The actual situation with reference to this feature of the case is evidenced by applying it to Wyoming Exhibit 176. From an inspection of this exhibit, we find that commencing with June of 1933 is a convenient time to take because the reservoir system is assumed to have filled and spilled at that time and following it, a series of years occurred when it did not fill again.

Wyoming Exhibit 171, printed at page 40 of the appendix to Wyoming's brief, shows the demand of Kendrick Project for July, August and September to be 108,000 acre-feet.

We can now construct the following table:

(VALUES IN ACRE-FEET)

Active Storage, Seminoe & Alcova Reservoirs (Assumed full June, 1933)	1,161,000
Less Requirement Casper-Alcova July, Aug. and Sept.; 1933 from Wyo. 171	108,000
Water available Sept. 30, 1933	1,053,000
1934-1938 requirement—5 years (5 x 208,000)	1,040,000
Storage at end of Sept., 1938	13,000

Thus it will be seen that instead of containing a seven year supply, the combined reservoirs contain water only for five irrigation seasons for Casper-Alcova plus a portion of a sixth season.

B.

THE ALLEGED EXCESS DIVERSIONS OF 1931, 1932 AND 1933.

In the Wyoming brief at pages 28 and 29, an attempt is made at an analysis of the excess diversions of 1931, 1932 and 1933, and an attempt is made to show that these excesses were the cause of the deficient supplies in subsequent years. It is contended that these excesses could have been stored in the Pathfinder Reservoir, and if so stored, there would have been ample water to make up the subsequent years' deficits so that no canal need have gone short of water in any of the subsequent years.

The table, on page 28 of Wyoming's brief, is made without any true analysis of the actual situation as it existed on the river. It is necessary to consider the situation in actual detail in order to determine (1) whether these excesses were in fact controllable or could have been stored in the Pathfinder Reservoir, and (2) whether, if so, Pathfinder Reservoir had sufficient capacity.

It must be remembered that the excess diversions complained of occurred in the Whalen to Tri-State Dam area. The Pathfinder Reservoir lies 215 miles upstream from Whalen diversion dam and large quantities of water enter the river between those two points. Much of this tributary inflow occurs in undivertible peak flows.

Moreover, an analysis is necessary to determine whether water would have been spilled if the so-called excesses had been retained in the Pathfinder Reservoir in addition to the amounts actually stored there.

The following operating table makes the analysis based upon actual conditions assuming that so far as possible the water claimed to be excess had been held back:

OPERATION TABLE PATHFINDER RESERVOIR, 1931-1933

HISTORICAL RELEASES AT PATHFINDER RESERVOIR REDUCED TO RETAIN IN STORAGE EXCESS WATER IN WHALEN - TRI-STATE DAM—Section 1931-1933

See Table and Statements Pages 28, 29 Initial Wyoming Brief. "Pathfinder, with its capacity of 1,045,000 Acre-feet would have been adequate to conserve the Excesses of 1931, 1932 and 1933" (Lines 5 to 8 of page 29 Initial Wyoming Brief)

This operation table prepared to show Pathfinder Capacity of 1,045,000 Acre-feet insufficient to control the excesses.

Excesses to be retained in storage	1931	113,300 Acre-feet
	1932	352,500 Acre-feet
	1933	465,100 Acre-feet
		930,900 Acre-feet

* In May 1933, no water was released from Pathfinder Reservoir. See Nebraska Exhibit 7.

In May 1933, 146,000 acre-feet of undivertible water passed the Tri-State Dam - See Wyoming Exhibit 180.

This water could not have been retained at Pathfinder since it originated on tributaries entering the North Platte River below Pathfinder. The 1931 excess is therefore reduced a like amount, namely 465,100 — 146,000 = 319,100.

All Values in Acre-feet

	Historical Inflows Pathfinder Res. (from Sheet 1, N-6)	Reduced Outflows Pathfinder Res. (from Sheet 1, N-7)	Pathfinder Reservoir Spills	Reservoir Contents as Revised at End of Month
Sep. 30, 1931				113,300-a-
Oct. 1931-Apr., 1932	395,400	43,100		465,600
May	456,000	65,200		856,400
June	435,000	236,000-b-	10,400	1,045,000
July	163,000	276,000-b-		932,000
Aug.	42,000	220,000-b-		754,000
Sep.	15,200	118,500-b-		650,700
Oct. 1932-Apr., 1933	281,200	35,300		896,600
May	222,000	0	73,600	1,045,000
June	513,000	214,000-c-	299,000	1,045,000
July	77,300	244,000-c-		878,300
Aug.	25,000	203,000-c-		700,300
Sep. 30, 1933	31,000	132,900-c-		598,400
			383,000	

Additional evaporation losses disregarded.

Notes: -a- Historically Pathfinder Reservoir was empty on Sep. 30, 1931 (See p. 15 Wyo. Brief). Assume a reduction in 1931 outflow of 113,300 acre-feet. The Sep. 30 carry over storage would amount to 113,300.

-b- Reduce 1932 releases by 352,500 acre-feet (June 100,000, July 100,000, Aug. 60,000, Sept. 92,500).

-c- Reduce 1933 releases by 319,100 acre-feet (June 100,000, July 100,000, Aug. 100,000, Sept. 19,100)

SUMMARY OF EXCESS WATER NOT STORABLE AT PATHFINDER

May, 1932	Pathfinder Reservoir Spill	10,400 A. F.
May, 1933	" " "	73,600 " "
June, 1933	" " "	299,000 " "
	Total Spill	383,000 " "
May, 1933	Undivertible Past Tri-State Dam	146,000 " "
		529,000 " "

Out of 930,900 acre-feet Excesses, 529,000 acre-feet uncontrollable, leaves as storable only 401,900 acre-feet.
This table prepared by R. I.. Meeker, Engineer.

From this it will be evident that only 401,900 acre-feet of the 1931, 1932 and 1933 excesses could have been stored. Wyoming's table, on page 28 of its brief, shows the deficiency for 1934 to be 515,400 acre-feet. Thus there would not have been sufficient additional storage in Pathfinder to take care of the 1934 deficiency alone let alone the deficiencies of subsequent years.

C.

WYOMING'S CONTENTION THAT THE MASTER'S REPORT DISREGARDS ADDITIONAL SUPPLIES FROM THE SEMINOE AND ALCOVA RESERVOIRS AND THE LARGE SUPPLIES IN THE YEARS 1920 TO 1929.

The argument is made, on page 30 of the Wyoming brief, that the Master's Report is fallacious in that it does not take into account the use of the Seminoe and Alcova Reservoirs, and in that it leaves out of consideration the large supplies of preceding years. The dependability of any recurrence of the 1920 to 1930 conditions is discussed

above, and we believe that it constitutes a sufficient answer to this argument of Wyoming. However, counsel for Wyoming evidently misunderstand and misinterpret the effect of the Master's Report.

It is evident that the Master's decree gives full recognition to all results that might follow from the construction of Seminoe and Alcova Reservoirs and to all results that might follow from a repetition of a series of years of plentiful water supply which might enable these reservoirs to fill. That is the necessary result of any priority administration and the Master's proposed decree (par. 3 and 4, p. 177 of the report) applies the principle of priority of administration in the relationships of the Kendrick Project to existing uses on the river. Under the Master's recommendation, if and when a supply is available for the Casper-Alcova Irrigation District in addition to the supplies necessary for the requirements of existing projects, the Kendrick Project is permitted to store the water and to divert and use it insofar as such storage, diversion and uses do not interfere with existing rights. This gives full recognition to the storage capacity which counsel for Wyoming refer to on page 30 of their brief, and to the possibility that ultimately there may be a supply of water available for it. While it does not give to the Kendrick the guaranteed supply which Wyoming demands, it gives all that Wyoming laws could afford it, namely, a supply within its priority.

In point of fact, Wyoming's complaint is not that the Master's Report fails to give just and equitable treatment to the Kendrick. The complaint of Wyoming is that the Master's recommendations do not guarantee a supply for Kendrick by making the various unfounded assump-

tions which Wyoming makes in its brief. In the argument, commencing on page 30, Wyoming chiefly seeks to have this court assume not only that all water rights on the river can be put on an equal and prorated basis but also that exactly the same series of years in respect to water supply will again be repeated in the future. This is carrying prophecy to a highly dangerous degree. Such assumptions, according to Wyoming's contentions, should be made as though they were actually certainties, and Wyoming seeks to have this court make a final and permanent distribution of water upon the basis of such a prophecy. Then, in recognition of the fact that such prophecy may fail to come true, Wyoming seeks, in paragraph 6 of its proposed decree on page 84, to have future deficiencies prorated, thus guaranteeing the Kendrick supply not only in times of plenty but also in times of drouth.

The Master's recognition affords to Kendrick all that it is entitled to but naturally does not propose to take water from existing established uses and give it to a project which is still undeveloped so far as concerns litigation.

D.

REQUIREMENTS IN THE WHALEN TO TRI-STATE DAM SECTION.

On pages 67 to 77 of the Wyoming brief, counsel attacked the allotments of water made to certain Nebraska irrigation projects whose supply is diverted in the section in question. The purpose of this argument is obviously an attempt to reduce the Master's estimated requirement for the Whalen to Tri-State Dam section of

1,027,000 acre-feet annually to the 950,000 acre-feet which was the assumed demand in this area made by Wyoming's engineer in the operation table (Wyoming Exhibit 176).

It is true that column 8 of Wyoming Exhibit 176 presents a varying demand for the Whalen to Tri-State Dam section in different years. Sheet 1 of Wyoming Exhibit 176 shows, however, that the demand as shown in column 8 of Wyoming Exhibit 176 is the demand of this section upon runoff originating above Pathfinder. In other words, the total demand of the Whalen to Tri-State Dam section is not shown upon Wyoming Exhibit 176, but it is decreased by the amount of the supply entering the stream below Alcova which would be available to supply the Whalen to Tri-State Dam area. On page 23 of the Wyoming brief, the total requirement of the Whalen to Tri-State Dam section as assumed in Wyoming Exhibit 176 is stated to be 950,000 acre-feet.

Thus Wyoming Exhibit 176 differs from the Master's recommendations in that the Master allots to the canals diverting in that section 77,000 acre-feet for each irrigation season in excess of the amount which Wyoming's engineer assumed in his Exhibit 176.

The section of the Wyoming brief, pages 66 to 77, is devoted to an attempt to reduce the Master's determination of the requirement to approximately the same figure which Mr. Nelson assumed. In fact, the attempt is to reduce this demand by 85,000 acre-feet which would make it even less than the Wyoming engineer conceded.

It is significant that Wyoming contends that only the Nebraska uses in this section should be decreased, and

that the Wyoming uses be left as the Master proposed. Although the proportionate needs in acre-feet requirements are approximately twenty-three per cent for Wyoming and 77 per cent for Nebraska (Master's Report, p. 152) counsel for Wyoming are evidently unwilling to recognize any corresponding duty on the part of Wyoming to share in any decreased allotment for this section.

We will discuss the canals on which the attempt is made to reduce water requirements.

1. Interstate Canal.

This is discussed on pages 67 to 72 of the Wyoming brief. The first reduction is an attempt to take 3,500 acres off of the 98,000 acres allowed for the Pathfinder Irrigation District in Nebraska by the Master's Report. This would result in a decrease of 15,000 acre-feet in the headgate allotment for the Interstate. This is discussed in detail on pages 68 and 69 of the Wyoming brief, and it is evident that the developed farms' irrigable acreage (Master's Report, p. 208) for the five years, 1936 to 1940, is used to arrive at Wyoming's figure of 94,500 acres. It is evident that the five years taken by Wyoming were in the depth of the drouth period when, because of the deficient water supplies shown in Table VII (p. 76 of the Master's Report), the Interstate Canal received an average of only eighty-six per cent of its requirements. In the preceding five years, the Interstate received an average of ninety-two per cent of its requirements, and the acreage was higher. The Master unquestionably evaluated conditions and took the average for the entire ten year period. Counsel do not present any convincing argument for taking only the five year experience.

The reduction here proposed in the Pathfinder District requirement amounts to 15,000 acre-feet.

Another element of reduction in the requirements of the Pathfinder Irrigation District is the claim that winter diversions into Lake Alice and Lake Minatare should be 73,000 acre-feet (the full capacity of these reservoirs) instead of the 46,000 acre-feet which the Master determined.

The Master's determination in this connection is found on pages 60 to 61. He points out that his figure is based upon operation of the reservoirs from 1928 to 1939, a twelve year period, and points out further that there is no evidence of improvident operation during that period. He suggests practical difficulties such as icing of the canals and reservoirs.

We submit that in this connection, there is no adequate reason for ignoring a twelve year period of operation which apparently was as careful as possible and taking instead a purely theoretical figure of 73,000 acre-feet where it is not shown that the reservoirs have ever been filled to this amount. We submit that the burden is upon Wyoming to present the evidence which would upset the Master's recommendation, and that Wyoming has failed in that burden.

An additional 18,000 acre-feet is challenged on the ground, as set out on page 70 of the Wyoming brief, that in one year, 1940, 7,640 acre-feet of water were pumped from the underground water supply and 550 acre-feet from drains. Wyoming assumes that this pumped water can be delivered at the land with no transmission loss, and that, therefore, it is the equivalent of 18,000 acre-

feet at the headgate which would result in a corresponding reduction in those headgate diversions.

The attempt to penalize the Interstate Canal by reason of the fact that irrigators used pumps in 1940 is grossly unfair. It must be remembered that each of these irrigators was required to pay assessments for operation and maintenance and all the other expenses of irrigation, including a share of the operation and maintenance of the Pathfinder and Guernsey Reservoirs, and that these payments should have assured these irrigators of an adequate supply. Instead, as shown by Table VII, page 76 of the Master's Report, the Interstate received, in 1940, only forty-five per cent of its requirement from the river including natural flow and storage. This was less than received in any other year of the ten year period shown on that table except only 1934 where the supply was forty-two per cent. Obviously, in 1940, those irrigators who used pumps had to pay a double price for their water. They not only had to pay for what should have been a full supply from the river but was only forty-five per cent, but they also had to buy, operate and maintain pumps. Wyoming seeks to throw upon these Interstate Canal irrigators this double expense for an indefinite time in the future simply because in 1940, when the nine Wyoming private canals diverted one hundred thirty-eight per cent of their requirements, the Interstate Canal had to get along on forty-five per cent of its requirement.

If pumping the water from underground sources and drains can be dispensed with in the Pathfinder Irrigation District because of an adequate supply from the river, the water which might otherwise have been pumped will

not be wasted. As shown by the Master's Report, it finds its way back to the stream through drains and the Master allots that drain water to the Northport Canal as evidenced by the discussion, pages 231 to 233 of the Master's Report; page 87 of the Master's Report and elsewhere.

The total decrease which Wyoming seeks to make in Interstate diversions is computed as follows:

Decrease for Use of Pumps	18,000	acre-feet
Decrease in Acreage	15,000	acre-feet
Increased Uses of Inland Reservoirs	27,000	acre-feet
Total	60,000	acre-feet

It is proposed, pages 71 to 72 of the Wyoming brief, that all of this diminution should be borne by Nebraska appropriators, although, admittedly, 2,300 acres of the area in question lies in Wyoming. The assertion is made but not proved that only two and one-half per cent of such supply is utilized in Wyoming. This same figure is used on pages 88 to 90 of the Wyoming brief which will hereafter be discussed in greater detail, and the criticism of the alleged two and one-half per cent figure applies equally to that figure, as used on pages 88 to 90 of the Wyoming brief.

In actual fact, the record shows that only eighty per cent of the water diverted for the Pathfinder Irrigation District crosses the state line. This, of course, means that the Nebraska uses of Pathfinder Irirgation District water are eighty per cent and the Wyoming twenty per cent. The following table demonstrates this fact:

	Diversion for Lingle Hill (Excerpt from U. S. 266, p. 70, App. Wyo. Brief)	p. 76 Master's Report Headgate Diversions Interstate	Interstate Canal Diversions delivered to Pathfinder Irrigation District (Column 3-Column 2)	Water Deliveries at State Line in Interstate Canal (N-611)
1931	37755	488600	450845	350450
1932	46159	592600	546441	438600
1933	39780	555800	516020	421700
1937	46930	494200	447270	364880
1938	44890	490000	445110	353360
1939	48360	418800	370440	282990
		Total	2776126	2212010
		Per cent	100%	80%

We cannot agree with the contention of Wyoming at the bottom of page 71 that the supply from pumps is utilized in Nebraska. This is a wholly unsupported statement made by Wyoming and certainly is not borne out by the quotation made on page 70. It is reasonable to take the same proportions of this as of the other water. There is equally nothing to show where the alleged reduction in acreage should be made as between Wyoming and Nebraska, yet Wyoming apparently concedes that that reduction should be prorated. Prorating the two reductions in headgate diversion requirements, assuming though not conceding that they should be made, we would find that of the 33,000 reduction in acreage claimed on account of these two items, 6,600 acre-feet should be taken from Wyoming.

However, we believe that the above answer to Wyoming's contentions is conclusive and that there is no justification for any reduction in acre-foot allotment of water.

2. Tri-State Canal.

Pages 72 to 74 of the Wyoming brief are devoted to a discussion of a claimed reduction in acreage of 3,300 acres from that allotted to the Tri-State Canal. We believe that in Nebraska's initial brief, pages 77 to 84, this contention is sufficiently answered. An elaborate discussion of the Tri-State is found on pages 233 to 244 of the Master's Report, and we believe sufficiently covers the arguments made by Wyoming. We are willing to rest our contentions upon the Master's discussion and Nebraska's initial brief.

3. Northport Canal.

Pages 74 to 75 seeks a reduction in the allotment of water for the Northport Canal upon the alleged ground that the drainage water (which is a part of the Northport allotment) should not be allowed the carriage loss which is given to the Northport water diverted at the headgate of the Tri-State Canal. Wyoming's contention is that the carriage loss should entirely be eliminated in connection with the drainage water. This is on the assumption that the drainage water is immediately used on the Northport land and does not have to be carried any distance through the canal.

It should be noted that in making these contentions, Wyoming must assume the burden of proof of establishing that the facts are as urged. No evidence is shown in Wyoming's brief nor in the portions of the record reproduced, that the facts are as assumed by Wyoming. Since unsupported assertions should not be allowed to override the Master's findings of fact, the attack made

by Wyoming on the allowance to Northport must necessarily be rejected.

However, the fact is that the drainage water in question all comes into the Tri-State Canal above the Red Willow division point between the Tri-State and the Northport. This is conclusively shown in the decision of *United States* v. *Tilley*, 124 Fed. (2d) 850. Therefore, on the face of the record, it is clear that the drain water diverted for Northport must bear some transmission loss. If that transmission distance is less than that water which is diverted at Tri-State Dam for Northport, no doubt the Master took such distances into account.

The record shows that all Northport water diverted from the river is carried a distance of 80 miles in the Tri-State Canal from the headgate on the river to the Red Willow rating flume, at which point the canal becomes the Northport Canal and the water Northport water. The map opposite page 57 of the Master's Report shows the Tri-State Canal and the point of intersection with the first drain, namely Sheep Creek drain, about five miles below the headgate. The fact is that approximately fifty per cent of the drainage water intercepted by the Tri-State Canal is from Sheep Creek Drain, and this water has to be carried 75 miles to the Red Willow rating flume. Within the next ten miles below the Sheep Creek interception with the Tri-State Canal are Akers Draw, Dry Spotted Tail Creek and Wet Spotted Tail Creek out of which an additional twenty-eight per cent of the drainage diversions are made by the Tri-State Canal. Such water must be carried at least sixty-five miles to the Red Willow rating flume.

It is entirely clear that Wyoming's attempt to cut down the Master's allowance of headgate diversions for the Northport Canal must fail not only from want of proof of its justification but also because the facts contradict Wyoming's contention.

E.

THE ATTEMPTED APPORTIONMENT OF EXCESS DIVERSIONS BETWEEN STATES.

On pages 88 to 89 of the Wyoming brief, an attempt was made to apportion as between Wyoming and Nebraska the excess diversions shown on pages 76 to 79 of the Master's Report.

The chief fallacy in this table lies in the apportionment of Pathfinder Irrigation District water as between Nebraska and Wyoming. Wyoming divides this, as shown on page 87, ninety-seven and one-half per cent to Nebraska and two and one-half per cent to Wyoming. However, as demonstrated, supra, page 190 of this brief, the actual record shows eighty per cent of the Pathfinder Irrigation District water goes to Nebraska and twenty per cent remains in Wyoming. Accordingly, the following revision is made of the table, pages 88 to 89:

REVISION OF STATE BENEFITS OF EXCESS DIVERSIONS, 1931 TO 1940, WHALEN - TRI-STATE DAM SECTION, PAGES 88, 89 WYOMING BRIEF.

SEPARATION OF EXCESS DIVERSIONS BY NEBRASKA

Canal		Acre-feet	Wyoming	Nebraska	
Interstate	1931-1933	242,000	48,400	193,600)	80%
	1937-1938	54,200	10,840	43,360)	
Fort Laramie	1932-1933	42,146	20,230	21,916	52%
9 Wyo. Private Canals	1932-1940	101,909	101,909	0	
Mitchell	1931-1937	37,430	0	37,430	
Gering	1931-1933	18,711	0	18,711	
Tri-State	1931-1939	285,201	0	285,201	
Ramshorn	1931-1933	3,853	0	3,853	
Northport	1933-1939	33,678	0	33,678	
Totals		819,128	181,379	637,749	
Per cent		100%	22%	78%	

Another fallacy is the attempt to make Nebraska responsible for the excess diversions of the Interstate, Fort Laramie and Mitchell Canals. The actual fact is that Wyoming and the United State have at all times been responsible for the diversions of the Fort Laramie and Interstate Canals and until August, 1935, Wyoming was responsible for the diversions of the Mitchell Canal (pp. 102-105, Master's Report). The same section of the Master's Report, likewise, shows that Nebraska has at all times objected to these excessive diversions because of the effect upon Nebraska senior canals, and it is obvious that such excess diversions would not have been made if Nebraska's views had been allowed to prevail in the administration of the river. We, therefore, believe that all of the excess diversions of the Interstate and Fort

Laramie Canals and the 1931, 1932 and 1933 excess diversions of the Mitchell Canal should be subtracted from the amounts charged against Nebraska and added to those charged against Wyoming. The following tabulation shows the results of such a computation:

	Wyo.	Nebr.
Total Interstate Excess Diversions	296,200	0
Total Ft. Laramie Excess Diversions	42,146	0
9 Wyoming Private Canals Excess Diversions	101,909	0
Mitchell Excess Diversions 1931-1933	31,560	0
Mitchell 1937 Excess Diversions	0	5,870
Other Nebraska Private Canals, Excess Diversions	0	341,443
	471,815	347,313
	58%	42%

V.

Kendrick Return Flow.

In the Wyoming brief, pages 77 to 80, a discussion occurs of paragraph 5 of the proposed decree, page 178 of the Master's Report, enjoining Wyoming from recapture of return flow of the Kendrick Project after it reaches the river. We agree in part with the discussion as presented by counsel for Wyoming to the extent indicated in our discussion, supra, page 107, of the criticisms by the United States of the same portion of the Master's recommendation for decree. It seems to be conceded by Wyoming and the United States alike that

permission should not be granted for the diversion of this return flow after it reaches the river under the category of return flow or under any contention that it is under the control either of the United States or of any private appropriator and thus earmarked for any particular projects. It is the contention of the United States that this return flow after it reaches the river should be treated as natural flow so that within its priority or within the percentage distribution of natural flow, a Wyoming appropriator would have a right to divert it as much as a Nebraska appropriator in a similar position. With this, we agree. At an earlier point in this brief (supra, p. 107), in discussing the contentions of the United States, we have suggested that the Master's recommendation for a decree might well be modified to provide that this return flow should be treated as natural flow.

We cannot agree with Wyoming's suggestion that the purpose of the Master's proposal is principally to prevent the use of Kendrick return flow on lands in Wyoming below Alcova. As we understand it, the purpose is to prevent any claim being made by Wyoming or the United States that this water is under the control of the United States the same as though it were storage water, and that it could be used by the United States to supply storage requirements of units of the North Platte Project. This, of course, would deplete the natural flow and obviously would thus damage the natural flow rights of the Nebraska irrigators who are here involved. We believe that the Master had no intention of preventing Wyoming natural flow users from diverting this water the same as any natural flow.

We would suggest that the solution of the difficulty is to treat this Kendrick return flow as natural flow as suggested on page 211 of the United States brief, and to the extent agreed to by Nebraska in the discussion of that portion of the United States brief (p. 107, supra).

Thus, paragraph 5 of the recommended decree in the Master's Report (pp. 178179) would read:

> "Treating, for the purpose of this decree, Kendrick return flow as natural flow, after it shall have reached the North Platte River and become commingled with the general flow thereof, and restraining Wyoming from diverting water from the river at or above Alcova Reservoir as in lieu of Kendrick return flow water reaching the river below Alcova."

VI.

The Wyoming Proposed Decree Attempts Control of Individual Projects in Wyoming and Nebraska Just as much as does the Master's Proposed Decree or Nebraska's Proposed Modifications Thereof.

It is apparently Wyoming's contention that one of the principal objections to the decree, as proposed by the Master and to Nebraska's alternative proposals, is the fact that they would involve and require direct interference with, and control of specific Wyoming and Nebraska appropriations. This is discussed on pages 30 to 35 of the Wyoming brief in which precedents in this court are cited. The conclusion is drawn that the rights of individual appropriators cannot be adjudicated in a suit to which they are not parties.

However, in paragraph 4 of Wyoming's proposal for a decree, page 83, Wyoming asks this court to enjoin the diversion of water from the North Platte River in the Whalen to Tri-State Dam section for Nebraska lands of more than 705,000 acre-feet in each irrigation season and further enjoins the conveyance past the Tri-State Dam of any water originating above that point for diversion from the North Platte River below Tri-State Dam.

This proposal is as much a control directly by decree of this court of specific Nebraska appropriations as anything proposed in either the Master's Report or Nebraska's alternative proposals. It is true that no specific canals or irrigation districts are named by Wyoming. The proposal is, however, a definite award of 705,000 acre-feet of May to September North Platte River flow to the Pathfinder Irrigation District, the Gering-Fort Laramie Irrigation District, the Farmers Irrigation District, the Mitchell Irrigation District, the Gering Irrigation District, the Northport Irrigation District and the Ramshorn Irrigation District as a group; and it is a limitation upon diversions and uses by that group of irrigation projects in excess of that amount. It further prevents Nebraska from allowing any of the water so awarded to those irrigation districts to pass to some other canal in Nebraska even though Nebraska law should require such transfer by reason of the principle of priority in distribution of water. It is an award specifically to that group of canals and not to the State of Nebraska, and, therefore, violates the principle for which Wyoming is contending, namely, that there should be a mass allocation or an award to states. The only latitude permitted by this provision of Wyoming's proposal for a decree is that readjustments might be made

within that particular group of canals. Other than that, Nebraska's jurisdiction or control over the water is entirely eliminated by this provision of the proposed decree. It is impossible to reconcile this proposal with the argument, pages 30 to 35 of the Wyoming brief, in which it is contended that each state must have full jurisdiction over the water awarded to it.

None of the canals above listed; none of the irrigation districts owning and operating the projects; and none of the water users under any of such projects are parties to this case. Yet Wyoming proposes that this court take control of the quantity of water allowed to those projects under its proposed decree without their presence as parties to the litigation. The Wyoming proposal gives them no opportunity to be heard as to the amount of water which can be supplied to those water users or projects as a group.

If the court is authorized to do this; if it is within the power of this court; then equally this court has power and authority to enter the kind of decree proposed by the Master or the kind proposed by Nebraska.

Equally, the two preceding paragraphs provide for similar control of specific projects further upstream. Paragraph 3, page 83 of the Wyoming brief, proposes a definite limitation upon the irrigation water in the Kendrick Project. This is in effect a control of the Casper-Alcova Irrigation District, although that district is not a party to this suit.

We believe it must be concluded that by making these proposals, Wyoming in effect withdraws its objection to

similar proposals in the Master's Report and in Nebraska's initial brief. Wyoming can hardly consistently contend that the court should enter a decree in the absence of the irrigation districts as parties, which decree would control and limit their operation, while at the same time objecting to similar control as proposed by the Master and by the State of Nebraska.

Counsel for Wyoming, realizing that the Master, on pages 160 to 161 of his report, points out this inconsistency, attempt to refute it on page 34 and page 100 of the Wyoming brief. We respectfully submit that this is a mere quibble. Wyoming's contention apparently is that by making the injunctive portion of the decree in form run against the state, the decree is not exercising control over the particular project. However, the Master's proposed decree likewise runs in words as respective injunctions against Colorado and Wyoming. We respectfully submit that the Wyoming explanation, on page 100, is directly contrary to the language of paragraph 4 of the proposed decree, on page 83. Counsel for Wyoming say:

> "Under our proposed decree, a limitation upon any canal is only such as may result from the limitation upon the state, and complete freedom of administration in each state is allowed."

If the limitation on the state specifically limits the amount of water that can be furnished to a particular canal or group of canals, this, of course, is a limitation upon such canal or group of canals. Freedom of administration within the state and complete supreme control by the state over the water is a mockery if the state is forbidden to enforce its laws closing a junior canal for the benefit of a senior canal.

We submit that Wyoming's own proposal for a decree in effect withdraws its objections to the Master's proposal.

Respectfully submitted,

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APPENDIX I.

A.

Extract from the Message of President Theodore Roosevelt, December 3, 1901, Fifty-seventh Congress, First Session. (See Journal of the Senate, Fifty-seventh Congress, First Session, pages 9 to 10.)

The forests alone cannot, however, fully regulate and conserve the waters of the arid region. Great storage works are necessary to equalize the flow of streams and to save the flood waters. Their construction has been conclusively shown to be an undertaking too vast for private effort. Nor can it be best accomplished by the individual States acting alone. Far-reaching interstate problems are involved; and the resources of single States would often be inadequate. It is properly a national function, at least in some of its features. It is as right for the National Government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storing of the floods in reservoirs at the headwaters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same streams.

The Government should construct and maintain these reservoirs as it does other public works. Where their purpose is to regulate the flow of streams, the water should be turned freely into the channels in the dry

season to take the same course under the same laws as the natural flow.

The reclamation of the unsettled arid public lands presents a different problem. Here it is not enough to regulate the flow of streams. The object of the Government is to dispose of the land to settlers who will build homes upon it. To accomplish this object water must be brought within their reach.

The pioneer settlers on the arid public domain chose their homes along streams from which they could themselves divert the water to reclaim their holdings. Such opportunities are practically gone. There remain, however, vast areas of public land which can be made available for homestead settlement, but only by reservoirs and main-line canals impracticable for private enterprise. These irrigation works should be built by the National Government. The lands reclaimed by them should be reserved by the Government for actual settlers, and the cost of construction should so far as possible be repaid by the land reclaimed. The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with those laws or with vested rights. The policy of the National Government should be to aid irrigation in the several States and Territories in such manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation.

The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of the Ohio and Mississippi valleys brought

prosperity to the Atlantic States. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent Western competition with Eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which would otherwise not come into existence at all. Our people as a whole will profit, for successful homemaking is but another name for the upbuilding of the Nation.

The necessary foundation has already been laid for the inauguration of the policy just described. It would be unwise to begin by doing too much, for a great deal will doubtless be learned, both as to what can and what cannot be safely attempted, by the early efforts which must of necessity be partly experimental in character. At the very beginning the Government should make clear, beyond shadow of doubt, its intention to pursue this policy on lines of the broadest public interest. No reservoir or canal should ever be built to satisfy selfish personal or local interests, but only in accordance with the advice of trained experts, after long investigation has shown the locality where all the conditions combine to make the work most needed and fraught with the greatest usefulness to the community as a whole. There should be no extravagance, and the believers in the need of irrigation will most benefit their cause by seeing to it that it is free from the least taint of excessive or reckless expenditure of the public moneys.

Whatever the Nation does for the extension of irrigation should harmonize with, and tend to improve, the

condition of those now living on irrigated land. We are not at the starting point of this development. Over two hundred millions of private capital has already been expended in the construction of irrigation works, and many million acres of arid land reclaimed. A high degree of enterprise and ability has been shown in the work itself; but as much cannot be said in reference to the laws relating thereto. The security and value of the homes created depend largely on the stability of titles to water; but the majority of these rest on the uncertain foundation of court decisions rendered in ordinary suits at law. With a few creditable exceptions, the arid states have failed to provide for the certain and just division of streams in times of scarcity. Lax and uncertain laws have made it possible to establish rights to water in excess of actual uses or necessities, and many streams have already passed into private ownership, or a control equivalent to ownership.

Whoever controls a stream practically controls the land it renders productive, and the doctrine of private ownership of water apart from land cannot prevail without causing enduring wrong. The recognition of such ownership, which has been permitted to grow up in the arid regions, should give way to a more enlightened and larger recognition of the rights of the public in the control and disposal of the public water supplies. Laws founded upon conditions obtaining in humid regions, where water is too abundant to justify hoarding it, have no proper application in a dry country.

In the arid states the only right to water which should be recognized is that of use. In irrigation this right should attach to the land reclaimed and be insep-

arable therefrom. Granting perpetual water rights to others than users, without compensation to the public, is open to all the objections which apply to giving away perpetual franchises to the public utilities of cities. A few of the western states have already recognized this, and have incorporated in their constitutions the doctrine of perpetual state ownership of water.

The benefits which have followed the unaided development of the past justify the Nation's aid and cooperation in the more difficult and important work yet to be accomplished. Laws so vitally affecting homes as those which control the water supply will only be effective when they have the sanction of the irrigators; reforms can only be final and satisfactory when they come through the enlightenment of the people most concerned. The larger development which national aid insures should, however, awaken in every arid state the determination to make its irrigation system equal in justice and effectiveness to that of any country in the civilized world. Nothing could be more unwise than for isolated communities to continue to learn everything experimentally, instead of profiting by what is known elsewhere. We are dealing with a new and momentous question, in the pregnant years while institutions are forming, and what we do will affect not only the present but future generations.

Our aim should be not simply to reclaim the largest area of land and provide homes for the largest number of people, but to create for this new industry the best possible social and industrial conditions; and this requires that we not only understand the existing situation, but avail ourselves of the best experience of the time in the solution of its problems. A careful study

should be made, both by the Nation and the States, of the irrigation laws and conditions here and abroad. Ultimately it will probably be necessary for the nation to cooperate with the several arid States in proportion as these States by their legislation and administration show themselves fit to receive it.

B.

Extract From House Committee Report No. 1468, 57th Congress, First Session, Pages 6 to 7.

Section 8 recognizes State control over waters of nonnavigable streams such as are used in irrigation, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to such laws. It also provides that nothing in the act shall be held as changing the rule of priorities on interstate streams. In order that the water rights acquired under the provisions of the act shall be of the character most approved by centuries of irrigation practice, and such as will absolutely insure the user in his right and prevent the possibility of speculative use of water rights, the character of the right which is contemplated under the act is clearly defined to be that of appurtenance or inseparability from the lands irrigated and founded on and limited by beneficial use. Under this section uniformity of record of the rights is secured and the rules of priorities of rights are not disturbed, while the cost of maintaining the administrative machinery of water distribution is placed on users and the States; the Government is free from all expense or responsibility when projects are completed and paid for.

The character of the water rights contemplated being clearly defined, the Secretary of the Interior would not

be authorized to begin construction of works for the irrigation of lands in any State or Territory until satisfied that the laws of said State or Territory fully recognized and protected water rights of the character contemplated. This feature of the bill will undoubtedly tend to uniformity and perfection of water laws throughout the region affected.

C.

Congressional Record, Vol. 35, Part 7, 57th Congress, 1st Session.

P. 6678. Mr. Mondell (Member of House in charge of the legislation during the course of its passage in the House):

"Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws. This section also clearly recognizes the rule of prior appropriation which prevails in the arid regions and, what is highly important, specifies the character of the water right which is provided for under the provisions of the act. Section 9 declares a policy of systematic and harmonious development of the irrigation possibilities of the arid region.

Operations Under the Measure.

"Having thus briefly outlined the provisions of the bill, I can perhaps best illustrate its workings by indicating how the Secretary of the Interior, as the agent of the Government under this act, would proceed. Should the bill become a law the Secretary of the Interior would

proceed to make preliminary surveys and examinations in various portions of the arid region, utilizing, of course, the surveys which have already been made by the government. These surveys and examinations would be made with a view of determining the most feasible and practicable projects, as well as those deemed, under all surrounding conditions, to be the most urgent.

"The examinations would necessarily be of a variety of projects, including large diversions, and reservoir projects as well as projects combining both diversions and conservation of water. Before the beginning of the survey and examination of a project, or at such time during its progress as seemed advisable, the Secretary of the Interior would withdraw from entry the land required for the irrigation works, and by designation of the lands which it is proposed to irrigate they would be withdrawn from entry except under the homestead law, and become subject to all charges, conditions, and limitations of the act, should the project be constructed.

"It having been ascertained that a sufficient supply of water for the irrigation of the lands in question was available and unappropriated and the feasibility of a project having been determined, the Secretary of the Interior would proceed to make the appropriation of the necessary water by giving the notice and complying with the forms of law of the State or Territory in which the works were located. He would then estimate the cost of the proposed works, and having determined upon their construction would advertise for bids for same, and would thereupon give notice of the limit of area per entry under the particular project, which limit under the provisions of the act would represent the acreage which, in the

opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question. At the same time notice would be given of the charges to be made per acre upon each entry and upon lands in private ownership which might be irrigated by the waters of the works in question, which charges are to be determined with a view of returning to the reclamation fund the cost of construction, and be apportioned equitably.'"

* * *

Pp. 6679-6680. "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard. It is not claimed that the State and Territorial laws relative to the use of water in irrigation are by any means perfect. The mistake was made in the early days of irrigation in some of the States of brushing aside and ignoring the ancient, just and equitable Spanish and civil laws relative to the use of water and of recognizing beneath the brazen sky of a parched and arid region the theories of water developed in a tight little island soaked in a perennial downpour and enveloped in little less than perennial fog; but in spite of our bad beginning we have made wonderful progress in legislation and in practical rules and usages. The effect of the passage of this bill will be to further encourage improvements in local laws, rules, and regulations. They are now, it is believed, in every State and Territory in the arid region sufficient to fix and guard the rights under this bill.

"Nothing is more important in an irrigation system than the character of the water right, and while some

of the States in the region in question recognize rights differing from those provided in this act, rights of the character herein provided are recognized as being the best and are fully protected by the local laws and tribunals.

"Mr. Robinson of Indiana: Mr. Chairman, I do not wish to interrupt the gentleman without his consent, but I should like to ask him two or three questions.

"The Chairman: Does the gentleman from Wyoming yield to the gentleman from Indiana?

"Mr. Mondell: My time is very short, but I should like to answer the gentleman. What is the gentleman's question?

"Mr. Robinson of Indiana: One is upon the subject of national or State control.

"Mr. Mondell: I am very glad to answer that.

"Mr. Robinson of Indiana: I will state both of them at once. The other is as to taking out of the Treasury of the United States, as I contend this bill provides for doing ultimately, of funds set aside for our agricultural colleges.

"Mr. Mondell: Well, I will say to the gentleman, answering his last question first, that the funds for the support of agricultural colleges now come out of the United States Treasury if the proceeds from land sales are not sufficient for that purpose. Provision was made for that in the so-called free-homes bill, for which I hope the gentleman voted.

"Now, as to State control over appropriation and distribution of water, I will say to the gentleman that

there is no reasonable ground for disagreement on that point. We began to legislate in regard to the use of water in irrigation in 1866. We have legislated continuously along this line. The President in his message declared in conformity with all the legislation which had preceded. The Republican platform declared in conformity with that legislation.

"The act of July 26, 1866 (14 Stat. L. 256; R. S. 2339), the first Federal legislation on the subject of rights to the use of water on the public domain, clearly recognized local control over such water in the following terms:

> 'Whenever by priority of possession rights to the use of water * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same.'

"The act of July 9, 1870 (16 Stat. L. 218; R. S. 2340), confirmed the provisions of the statute of 1866, as follows:

> 'All patents granted or pre-emption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts.'

"And the act of March 3, 1877 (19 Stat. L. 377), still further recognizes rights obtained under local laws, and fully recognizes the right of appropriation.

"The act of March 6, 1891 (26 Stat. 1095, 1102), grants the right of way through the public land for the

construction of reservoirs, canals, and ditches, provided that 'the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective States or Territories.'

"The act of June 4, 1897 (30 Stat. 1136), referring to forest reserves, provides for the use of waters on such reserves 'under the laws of the State wherein such forest reserves are situated.'

"There are several other acts of Congress recognizing the control of the States over the use of waters within their borders; one being the act of March 2, 1897, recognizing the control of the State of Colorado over the waters which might be impounded in a certain reservoir site.

"There have been a number of decisions of the General Land Office and regulations issued by the same authority recognizing the doctrine of State control. In the circular of February 20, 1894, on page 169, the following language is used:

> 'The control of the flow and use of the water is therefore a matter under State or Territorial control.'

"And in the decision in the case of H. H. Sinclair, et al. (18 L. D. 573) it is said:

> 'The act of March 3, 1891, deals only with the right of way over the public land to be used for the purposes of irrigation, leaving the disposition of the water to the State.'

"The General Land Office, in operating under the desert-land law, recognizes only water rights certified by State authorities.

"The Supreme Court has also in several decisions recognized the right of the state to regulate and control the use of water within its borders. And turning to political and administrative declarations we find that the Republican party in its platform of 1900 in its irrigation declaration used the following language:

> 'Reserving control of the distribution of water for irrigation to the respective States and Territories.'

"President Roosevelt in his message said:

> 'The distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws and without interference with these laws or with vested rights.'

"Now, I hope I have answered the gentleman, and I trust he will not interrupt me further, much as I would be pleased to answer him, for my time is limited.

"The provisions of the bill in this regard may be considered ideal, and at the same time extremely practical. The settler is provided with the best form of water right, and the protection of this right and the proper distribution among users under these rights becomes at once a matter of local concern, and the expenditures relative thereto are borne locally.

"The provisions of section 9 relative to the distribution of the fund are believed to be wise and equitable. The fund may be used at any point in the arid region, but ultimately each State and Territory which has feasible and practicable projects is to receive the benefit of at

least half of the proceeds of the sales of public lands within such State.

"It will be seen from this brief statement of the form and character of the proposed legislation that it is simple in its operation; that it is calculated to provide homes on the public domain in small tracts for actual settlers; that it invites no conflict between Federal and State authorities; that it will reduce the size of private holdings in the arid region, and that it will tend to a harmonious development of all parts thereof."

* * *

P. 6680. "In some of the arid States land and water rights can be condemned for the purposes contemplated in this bill, and in such States the Secretary of the Interior would have as much authority to condemn as any other individual, and no more. Where the State laws do not recognize the right to condemn property for the purposes contemplated in the act, it will not be condemned, and there is the end of it; but the power to condemn water rights and lands is by no means necessary for the carrying out of this act, and where the power is possessed it would in all probability be very seldom exercised; and where the State laws do not authorize condemnation, and projects cannot be carried on without condemnation, those particular projects will not be undertaken, and others, where there is no such obstacle, will."

* * *

P. 6687. "Mr. Ray of New York: I am coming to that, but here are gentlemen every little while asking me questions and trying to divert me. I will come to that question as rapidly as I can. The gentleman from

Nevada says in effect, not words, that Nevada, or a large portion of it, can, at the public expense, be made to blossom like the rose if the Eastern taxpayers are willing to pay for the improvement and give up their share of the public moneys derived from the sale of public lands. 'Well,' we say, 'is there water in Nevada? Is there water there that you can apply to the irrigation of the arid land?' 'No.' 'Where will you get the water?' 'We propose to go into the State of California, on the eastern slope of her mountains, and there, if they will not give or sell it to us, we propose to condemn the right to take the head waters of those streams, conduct that water into the State of Nevada to use for irrigation purposes. If need be, we will take it against the will of the State of California and then distribute it over the arid lands of Nevada for the purposes of irrigation.'

"Gentlemen who favor this bill propose that the Government shall go up into the foothills of the Rocky Mountains for a supply of water and if the State will not surrender the right to the Government to store and dam up these head waters of the streams, they propose to go into the State courts and condemn these water rights for the purpose of irrigation; not in the State where they propose to irrigate, but in Colorado they propose to condemn lands and water rights to irrigate arid lands in Nebraska or Kansas, or it may be in some States farther north. They are going to take and condemn water and water rights in one State, store the water for purposes of irrigation in some other State or in two or three States. What does the proposition lead to? It leads to this question: Has the General Government of the United States power, in the exercise of its sovereign right, to go into a State and condemn water or

water rights, store that water, and then conduct that water where they please for the purpose of irrigating arid lands belonging to the Government for the purposes of sale to private owners?

"If we have that power, then the General Government has the power to go into every State of this Union, to go to the headwaters of the Mohawk River, to the headwaters of the Hudson River and store those waters, divert them into Lake Ontario, divert them into a canal that shall flow across the State of Massachusetts and empty into Boston Harbor. If they have that right, they may take the headwaters of the Ohio River, divert those waters into some stream that shall empty into the Potomac River or the Chesapeake Bay. You may say to me, gentlemen, if you please, that such a scheme is impracticable. That I might concede, but that is not the question; it is a question of power, and I say that constitutionally, in my judgment, it can not be done. Now, let me tell you why.

"Mr. Mondell. Will the gentleman allow me?

"Mr. Ray of New York: No, I can not yield.

"Mr. Mondell: But the gentleman has got a bogy man that is not in the bill.

"Mr. Ray of New York: I have got no bogy man.

"Mr. Mondell: Whereabouts does the gentleman find any such provision as he is arguing? Whereabout in the bill is there anything that attempts to give the Federal Government any right to condemn or to take any water right or do anything which an individual could not do? Will the gentleman point out any place or any

provision for the Federal Government to do anything that I could not do if I owned the public land?

"Mr. Ray of New York: Do you say there is nothing in this bill that provides for condemnation?

"Mr. Mondell: The bill provides explicitly that even an appropriation of water cannot be made except under State law.

"Mr. Ray of New York: Let me see. There is one great trouble with the bill—"

* * *

P. 6766. "Mr. Ray of New York: Mr. Chairman, I do not suppose those who favor this bill will pay any attention to propositions to perfect or amend. If the bill goes through that seems to be all they want, regardless of consequences to follow. Allow me to call attention to section 8 in connection with section 9. What laws are to govern and apply in the execution of this bill? The laws of the State in which the water, in which the reservoirs, or in which the canals may be? Do gentlemen know of any two States in this Union that have like laws? We are to take water in California and store it there. That water is to be controlled by the laws of California. A canal from that reservoir is to run into the State of Nevada, and the State laws of the State of Nevada are to control the canal and water when it gets there. And so in some other State like Wyoming you store the water in one State and the laws of that State control while it is there. The water runs into a third State, where it is to be distributed in irrigating the land, and the laws of that third State control the distribution, and yet gentlemen think that it will be practicable to put

this bill into operation. It can not be done under this bill as it stands.

"The United States Government surrenders all control. Congress surrenders all control. The laws of the several states are to control. I simply point this out to you, gentlemen, because when this law is written on the statute book it will be impossible of execution until amended and changed. Any lawyer who studies all of these peculiar provisions will be astounded at its impracticability and conflicting provisions.

"I have no idea that these amendments to the Senate bill, which have been adopted by the House committee in order to avoid insuperable objections which have been presented, will be adopted by the Senate. The Senate will have a substitute. It will have something to put in the place of this, because I believe that it is now agreed, both by the majority of the Senate and the majority of the House, that in any event this robbery or looting of the Treasury of the United States must be authorized before this Congress adjourns. (Applause.)"

P. 6770. "Mr. Sutherland: But it is said that the bill contains conflicting provisions; that it contemplates a divided control; that as soon as a major portion of the lands to be irrigated under any particular enterprise has been paid for, the control, the management, the operation of the irrigation works shall pass to the owners of the lands, but that the title to and the management and operation of the reservoirs and works necessary for their protection shall remain in the Government. The two provisions are absolutely distinct and are absolutely consistent.

"The title and control of the reservoirs themselves and the works incident to their maintenance, namely, the dam and headgates, remain in the General Government precisely the same as the owership of a navigable lake or a river remains in the public, but the canals and the lateral ditches by which the water is diverted and applied to the land are under the control, ownership, and management of the users of the water just as the canals and ditches taken from a public lake or public river would be under their control, and no more confusion can result in the one case than has actually resulted in the other.

"But it is said, further, that the laws of the State or Territory relating to the control, appropriation, and use of the water are not to be interfered with, and this will result in still further confusion. The confusion is in the mind of the objector and not in the bill. No more confusion will result from the use of these waters under the local laws and regulations of the State than have resulted by the use of other waters or property.

"The fact that the title to a lake is in the public, the title and ownership and control of the canals leading from it is in the proprietors of the water, and that the appropriation and use of the water is under the State law has never resulted in any sort of confusion. On the contrary, if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail. The full domination and complete ownership of a tract of land is in no manner injuriously affected, because its title must be acquired and disposed of and it must be occupied and held under and in accordance with the law of the State."

Decision of Department of Interior on Reclamation Act Withdrawal of Public Lands for Irrigation Purposes—Act of June 17, 1902.

(Decisions of the Department of Interior relating to Public Lands—Vol. XXXII, January, 1903, to May, 1904, P. 254.)

Opinion.

"There is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use or distribution of water."

Assistant Attorney-General Campbell to the Secretary of the Interior, September 5, 1903.

"I am in receipt, by reference of a communication from the Director of the Geological Survey, recommending that all the lands within a half-mile on each side of the center line of Salmon river, Okanogan county, Washington, together with the water flowing thereon, be withdrawn from further disposition, as the same are required for engineering works contemplated under the provisions of the act of June 17, 1902 (32 Stat. 388), known as the 'act for the reclamation of arid lands.' Said communication has been referred to me for an opinion as to whether or not such withdrawal can be legally made.

"The purpose to be accomplished by the withdrawal, as will be seen from the text of the letter, is to control the use of the water passing through the lands proposed

to be withdrawn, so as to prevent its appropriation by others in any manner that will impair the continuous flow of the water through said lands, in violation of the common law right of riparian proprietors. The practical question thus presented is, whether the United States, by the exercise of executive authority, has the right to control the use of unappropriated waters passing through the public lands in a State, so as to prevent their appropriation by others for any of the beneficial uses recognized and allowed by the statutes of the State.

"The United States, as proprietor of the public lands through which a stream of water naturally flows, has the same property and right in the stream that any other owner of land has, be it usufructuary or otherwise. The stream of water is part and parcel of the land, and the right to the use of it and to its continuous flow, without alteration or diminution, is, under the common law, a right incident to the ownership of the soil, enjoyed alike by every riparian proprietor. It is not a property in the water, but a simple usufruct as it passes along. 3 Kent's Com., Sec. 439; *Union M. & M. C.* v. *Ferris*, (2 Sawy. 176); *Vansickle* v. *Haines*, (7 Nev. 249); *Lux* v. *Haggin*, (69 Cal. 235).

"Such is the cardinal rule that controls in every state of the Union which has simply adopted the common law. While this is true, 'it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise' (*United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690-702). But, 'in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a

stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial use of the government property' (*Id.* 703).

"It thus appears that, while the United States, as to the public lands within a State, and the innavigable streams and lakes situated therein, has only the right of a riparian proprietor, such right, without express authority from Congress, cannot be controlled by State laws regulating the control and appropriation of waters within its dominion. The exemption of the United States, as to its public lands, from State control of the innavigable waters situated therein, is by virtue of its absolute power of disposition of the public lands, with all the rights incident thereto. 'No State legislature can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.' *Gibson* v. *Chouteau*, (13 Wall. 92, 99); see, also, *Irvine* v. *Marshall*, (20 How. 558).

"In all the arid land states the common law rule as to the right of a riparian proprietor to the continued flow of a stream over his land has been changed, and rights to the use of water for manufacturing, mining, agricultural and other beneficial purposes have accrued and vested, under local customs, the laws of the States and the decisions of the courts. The statutes of a State providing for the diversion and appropriation of the waters of a flowing stream for irrigation or other public uses is a valid exercise of the legislative power of a sovereign

State (*Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112). The constitution of the State of Washington declares that 'the use of the waters of this State for irrigation, mining, and manufacturing purposes shall be deemed a public use.' The laws of the State provide that the use of such water may be acquired by appropriation, and as between appropriations the first in time shall be first in right. The right thus acquired is a property right that may be transferred by deed. Although in that State, as in all other States of the arid West, the common law was adopted and recognized, their peculiar physical conditions soon 'compelled a departure from the common law rule, and justified an appropriation of flowing waters for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by State legislation, a different rule—a rule which prevents, under certain circumstances the appropriation of the waters of a flowing stream for other than domestic purposes.' *United States* v. *Rio Grande Irrigation Co.*, supra, page 704.

"Such legislation would, however, have had no effect upon the rights of the United States as to the Public lands and the waters of the streams and lakes thereon, but for the act of July 26, 1866 (4 Stat. 253—Rev. Stat., Sec. 2339), and subsequent acts of the same character. The effect of the act of July 26, 1866, was to recognize, so far as the United States is concerned, the validity of the local customs, laws, and decisions of courts, in respect to the appropriation of water. *Broder* v. *Water Co.* (101 U. S. 274); *Atchison* v. *Peterson* (20 Wall. 507); *Casey* v. *Gallegher* (Id. 670).

"The act of July 9, 1870 (16 Stat. 217—Rev. Stat., Sec. 2340), amending the act of July 26, 1866, provided

that 'all patents granted, or pre-emption or homestead rights allowed, shall be subject to any vested and accrued water rights' as may have been acquired under said act of July 26, 1866.

"The act of March 3, 1877 (19 Stat. 377), providing for the sale of desert lands, authorizes the use of water upon said lands necessary for the irrigation and reclamation thereof, and further provides that 'all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.'

"Such right is again recognized and sanctioned by section 18 of the act of March 3, 1891 (26 Stat. 1095), granting the right of way over the public lands for canals, ditches, etc., which provides that 'the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.'

"These acts evince a clear and definite purpose to authorize and assent to the appropriation of water upon the public lands in contravention of the common law rule as to continuous flow. As stated by the court in *United States* v. *Rio Grande Irrigation Co.*, supra (page 706), 'the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to common law rule, which permitted the appropriation of these waters for legitimate industries.'

"The question again came before the court in *Guiterres* v. *Albuquerque Land Co.* (188 U. S. 545), involving the validity of the Territorial act providing for the construction of canals and reservoirs and for the diversion and appropriation of the waters in the Territory of New Mexico for irrigation or other public uses. One of the contentions urged against the right to divert the water was, as stated by the court, 'that the territorial act was invalid, because it assumed to dispose of property of the United States without its consent.' The court, after stating that the proposition proceeded upon the hypothesis that the waters affected by the statute are public waters—the property, not of the Territory, or of private individuals, but of the United States, and that the statute permits private persons and corporations, for pecuniary profit, to acquire the unappropriated portion of such public waters, in violation of the right of the United States to control and dispose of the same—said (p. 552):

> 'We think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain, particularly referred to in the opinion of this court in United States v. Rio Grande Irrigation Co. (174 U. S. 690, 704, 706), the objection is devoid of merit.'

"As illustrative of the purpose of Congress to continue to recognize and sanction the right to appropriate the waters upon the public lands for beneficial uses, under the laws of the States and Territories, the court refers to section 8 of the act of June 17, 1902, supra, which, it observes, 'reflexively' illustrates the purport of the previous acts; and it concludes that the act of the Territory of New Mexico, then under consideration 'is not inconsistent with the legislation of Congress on the

subject of the disposal of waters flowing over the public domain of the United States' (p. 554).

"Section 8 of the act of June 17, 1902, referred to by the court, is as follows:

> 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof; Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'

"The absolute right to appropriate the waters flowing over the public lands has been so obviously sanctioned by the acts referred to, and so clearly determined by the decisions cited, as to be no longer an open question. The Director of the Geological Survey, however, bases his recommendation for a withdrawal of land and the riparian right incident thereto upon the theory that whatever recognition and assent may have heretofore been given to the appropriation of the waters on the public lands, the United States may at any time resume the control of all unappropriated waters on such lands, and that 'as the Secretary of the Interior has full power to withdraw from entry any unappropriated lands which, in his opinion, may be necessary for public uses, there ap-

pears to be no reason why the Secretary may not, at the same time, withdraw both the land and the water from further appropriation, when the same are required for public use.'

"Whether the United States, by the legislative branch of the government, may resume its common law right of riparian proprietorship as to the unappropriated waters flowing over and upon the public domain, by the repeal of the several statutes recognizing rights in contravention thereof, is a question that need not be discussed in determining the question submitted. It is sufficient to say that no such power or authority rests with the executive branch of the government, in view of the express statutory provision which recognizes and assents to the appropriation of such waters. Those acts are still in full force and effect, and their operation cannot be limited or suspended by executive authority. Section 8 of the reclamation act is an emphatic declaration that such laws are to continue in force. It expressly declares that in carrying out the provisions of the act it shall not 'interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder,' but that it 'shall proceed in conformity with such laws.' A withdrawal of waters from appropriation under the State and Territorial laws would be in direct conflict with the provisions of said section.

"I have therefore to advise that there is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, or will in any manner interfere with its laws relating to the control, appropriation, use or distribution of water.

"I would advise, however, that the land be withdrawn, so that the rights of the United States as proprietor of the land may be protected as far as the reservation of land will protect and preserve such rights.

"Approved:

"*E. A. Hitchcock*, Secretary."

Legislative History of the Warren Act

Steps in the Passage of S. 6953

(An act authorizing contracts for the disposition of waters of projects under the reclamation acts, and for other purposes.)

March 7, 1910—Bill introduced, read first time, and, by unanimous consent, the second time, and referred as follows: To the Committee on Irrigation and Reclamation of Arid Lands.

(Congressional Record, Vol. 45, Part 3, 61st Congress, 2nd Session, p. 2829.)

March 23, 1910—Mr. Warren from the Committee on Irrigation and Reclamation of Arid Lands, to whom was referred the bill, reported it with amendments and submitted a report (No. 442) thereon.

(Congressional Record, Vol. 45, Part 4, 61st Congress, 2nd Session, p. 3591.)

March 25, 1910—Bill debated as follows (Congressional Record, Vol. 5, Part 4, 61st Congress, 2nd Session, pp. 3740-48):

"Mr. Warren: I ask unanimous consent to call up the bill (S. 6953) to provide for the disposition of surplus waters of projects under the reclamation act.

"The Presiding Officer: The bill will be read for the information of the Senate.

"The Secretary: The bill was reported from the Committee on Irrigation and Reclamation of Arid Lands with an amendment, to strike out all after the enacting clause and insert:

"'That whenever in his judgment any part of the water supply of any reclamation project can be disposed of so as to promote the rapid and desired development of such project the Secretary of the Interior is hereby authorized, upon such terms, including rates and charges, as he may determine just and reasonable, to contract for the delivery of any such water to irrigation systems operating under the act of August 18, 1894, known as the Carey Act and to corporations, associations, and irrigation districts organized for or engaged in furnishing or distributing water for irrigation. Delivery of water under any such contracts shall be for the purpose of distribution to individual water users by the party with whom the contract is made: Provided, however, That no such water shall be distributed otherwise than as prescribed by law as to lands held in private ownership within government reclamation projects.

"'In fixing rates and charges to be fixed in such contracts for delivery of water to any irrigation system, corporation, association, or district, as herein provided, said Secretary shall take into consideration the cost of construction and maintenance of the reclamation project from which such water is to be furnished. No irrigation system, district, association

or corporation so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid by it to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through its works.

"'Sec. 2. That in carrying out the provisions of said reclamation act and acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, associations, or corporations for the construction of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, associations or corporations for impounding, delivering, and carrying water for irrigation purposes; Provided, That the title to and management of the works so constructed shall be subject to the provisions of Section 5 of said act; Provided further, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate 160 acres.

"'Sec. 3. That the moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms of the reclamation act and the acts amendatory thereof or supplementary thereto.'

* * *

"Mr. Borah: I wanted to ask the Senator from Wyoming (Mr. Warren) a question. As I understand this bill, or as I thought I understood it, this does not provide or undertake in any way to change the *modus operandi* by which a person gets title to water under the laws of the State, does it?

"Mr. Warren: Not at all. The Government itself only gets, as trustee, control of water by the law under the State or by grant from the State.

"Mr. Borah: And what would finally result would be that under this bill the settler alone would get title to both the land and the water.

"Mr. Warren: Nobody else would obtain the control of it.

"Mr. Heyburn: Mr. President, the Government does not get title to the use of this water under the State or under any law of the State.

"Mr. Borah: Mr. President, that undoubtedly is correct. The Government does not, but the final result of it all is that the man who owns the land also secures title to the water. That would be true under this bill, the same as under the reclamation law. The Government cannot appropriate the water and hold title to the water without applying it to a beneficial use. It can only apply it to a beneficial use through the activity of the settler, and when the settler has applied it to a beneficial use, he takes title under this bill the same as under the law.

"Mr. Warren: That is precisely what will happen under this bill, and precisely what is the condition under the law at present."

* * *

"Mr. Borah: Mr. President, we cannot by any act of Congress transfer any power which belongs to the State of Idaho to the Secretary of the Interior. In so far as the constitution of our State fixes the question of water rights and the power of the legislature to control rights in the manner in which citizens shall appropriate

water, and so forth, it being purely a domestic matter and wholly within the control of the State, no act of Congress could change the law of the State.

"Mr. Heyburn: I agree with my colleague in that.

"Mr. Borah: And I was going to say that I agree with my colleague perfectly upon the proposition that it is not within the power of Congress to take that right away from the State, and if it were within the power of Congress, I should not consent to do it, because I believe that the water of the State belongs to the State and should be controlled by the State, and by no one else. In that respect I agree perfectly with my colleague; but here is a situation where a certain relationship exists as a business proposition between the Reclamation Service and irrigation districts and corporations desiring to secure water from them. That has nothing to do with the question of fixing the right of the citizen as between the first corporation and himself; but in order that the Reclamation Service may cooperate with corporations within the States for the purpose of using their reservoirs and canals and securing water from them, this bill was prepared.

"Under the present law we are in condition; that, notwithstanding the fact that the Reclamation Service may desire to cooperate with parties in the States for the purpose of putting water upon land, it can only do so upon very strict and limited terms; but; under this proposed law, if an irrigation district should be formed and should find that it could cooperate with the national Government, it would have the power to make a contract.

"Mr. Heyburn: Where would it get the power?

"Mr. Borah: It would get it from this act of Congress.

"Mr. Heyburn: Yes; but my colleague admits that an act of Congress cannot take away or divide with the State the power to do it.

"Mr. Borah: I was not discussing that feature of it just then.

"Mr. Heyburn: Well, the Senator cannot separate them. Let me call my colleague's attention to this situation: Suppose someone wanted this water after the Reclamation Service was through with it, for mining or domestic purposes, and he ran up against an act of Congress authorizing them to pass over those to preferred rights and sell the water to the third in rank?

"Mr. Borah: No; Mr. President, they could not do anything of that kind.

"Mr. Heyburn: The bill says they may.

"Mr. Borah: Well, before this water title becomes stationary and fixed, there must be the indispensable element of a private citizen connecting himself with the land.

"Mr. Heyburn: It never does become fixed. The title is to use the water; and when the use ceases the title ceases.

"Mr. Borah: And that is the absolute safety and guaranty of this bill, because unless the citizen is there and using it, unless he applies it to a beneficial use, it is immaterial how much the Secretary undertakes to sell; he sells nothing, because the water reverts back into the public ownership, and Tom, Dick and Harry may go

and appropriate it, unless a prior party has applied it to a beneficial use.

"Mr. Heyburn: This amendment does not so provide.

"Mr. Borah: It is not necessary for this amendment to so provide.

"Mr. Heyburn: This amendment precludes the possibility of it.

"Mr. Borah: It does not preclude it, Mr. President, for the reason that it is not within the power of Congress to preclude it.

"Mr. Heyburn: Now, the Senator is merely arguing along the line I stated at first, I said that I objected to this because it will be futile, because Congress has no right to do it. I would not concede for a minute that this law could be enforced in the State of Idaho. It could not be. The courts would stop it just as they have stopped the hand of the vandal in the decision of the Balderson case.

"Mr. Borah: Mr. President, may I ask my colleague this question, because this is what we are seeking to do in this bill: Suppose that the Government has constructed a reservoir canal and has the reservoir filled with water, and suppose the citizens of the State of Idaho have organized under the laws of that State what we call an irrigation district, is there any reason why the Government should not contract with the irrigation district for the purpose of enabling it to use its reservoirs in storing its water or using its canals in carrying the water to its citizens?

"Mr. Heyburn: That is not the problem. Let us drop corporations and organizations—

"Mr. Borah: That is the problem that we are seeking to reach.

"Mr. Heyburn: Oh, no. That is not the problem; that is what they would like to have it; but that is not the problem. They have lost sight entirely of the individual in this case. Let us drop the water corporations, the Carey Act, and the reclamation schemes. Where is the right remaining in the farmer or in the man with the mill, who desires the water for the purposes of power, protected here, if this representative, not of the State of Idaho, but of the Government of the United States, can sell it to somebody else? Where is his right to go in there and appropriate this surplus water for the purpose of running the machinery of a mill, or where is there protected his right to take up the water for his own private farm?

"Mr. Borah: If this private citizen reaches the river or the stream and appropriation before the water is applied to a beneficial use elsewhere, his right is perfect from that time.

"Mr. Heyburn: Suppose it has been sold by the Secretary of the Interior?

"Mr. Borah: If it has been sold by the Secretary of the Interior and not applied to a beneficial use by a settler or citizen, the other man may unquestionably appropriate it.

"Mr. Heyburn: Suppose it has been sold to a Carey Act project without considering the right and the necessities of the man with an individual holding of land or a mill?

"Mr. Borah: If it has been sold to a Carey Act

proposition;, if that inevitably includes the individual citizen who is going to apply it to his land—

"Mr. Heyburn: Not necessarily. He may be on the other side of the river.

"Mr. Borah: If he is on the other side of the river and cannot use the water, he has not applied it to a beneficial use, and has not any title to it.

"Mr. Heyburn: He may carry it across the river, or take it out on the other side of the river.

"I see through this proposition. It is an attempt to weld together the Reclamation Service as the master of all the water users in the State. That is what it would do, if they could do it. The comfort down in my heart is the knowledge that the fate of this bill is already settled, the confidence that the Supreme Court will upset it.

"But, nonetheless do I feel called upon to stand here, so that hereafter no man shall ever charge that I stood idly by and saw the sacred rights of the State turned over to the control of an officer of the Government of the United States.

"Mr. Borah: The answer to that, it seems to me, is this: The Secretary of the Interior can only be master of the situation until the citizens of the state, under the process of law, take hold of it, because, as soon as citizens have paid for the water, the Secretary of the Interior steps out of the matter entirely and leaves it to the State of Idaho.

"Mr. Heyburn: What citizen? Is it the citizen who runs a machine shop or the citizen who has a farm to

irrigate or the citizen who needs the water for domestic uses? Which one of these citizens is it?

"Mr. Borah: All of those citizens.

"Mr. Heyburn: No. You see we were wise in providing in the constitution for the order in which the rights should attach.

"Mr. Borah: I assert again that this does not change it nor can it change it.

"Mr. Heyburn: Oh, yes, in express terms.

"Mr. Borah: But my colleague has said it is not within the power of Congress to do that; and I agree with him.

"Mr. Heyburn: Would my colleague vote for the passage of a bill here which, down in his heart, he thought the courts would hold to be beyond our power?

"Mr. Borah: No, sir; neither down in my heart nor up in my brain would I vote for such a proposition; and I say that this bill does not cover that subject. But I go further and say that if the interpretation were put upon it that my colleague puts upon it, we should still be safe, because it is beyond our power to do that.

"Mr. Heyburn: How does that make it safe?

"Mr. Borah: As a matter of fact, the bill does not go to the extent my colleague contends. It does not assume to control that which it is within the power of the State to control. But if it did so, my colleague would be perfectly safe, because it would not be within our power to do that."

* * *

"Mr. Warren: The rights to the use of water in Idaho, Wyoming, and the other States which have already vested cannot be violated by any legislation.

"Mr. Heyburn: That is the worst argument in favor of the enactment of a statute that I ever heard—that because you have the assurance in your bosom that the court will hold it a violation of the power of Congress, you may enact anything. Then we do not need to discuss any law at all here.

"Mr. Warren: If it pleases the Senator to turn it in that way, I have no objection. But it is idle for him to stand here and argue that we are by this law taking away the rights of citizens in Idaho and Wyoming, when it cannot be done. That is no argument as applied to this bill.

"Mr. Heyburn: Then why enact a statute here that cannot be executed? Why enact a statute—

"Mr. Warren: It can be executed, and with proper reference to the rights of all settlers who now have rights under the statutes, and it can only be proceeded with in due regard to all those rights. Everything done under the proposed law by the Secretary of the Interior must be under the laws as to water of the States in which the water originates.

"Mr. Heyburn: Of course; but this bill does not provide that it shall be. I know that it must eventually. This proposed law does not provide or reserve to the States this right."

* * *

April 5, 1910—Further debate was had, in part as follows (Congressional Record, Vol. 45, Part 4, 61st Congress, 2nd Session, pp. 4259-4263):

"Mr. Heyburn: Mr. President, this is quite an important measure, probably as important as a principle of legislation as any measure before Congress at this session. The basis of the objection that I urged to this measure on a former occasion was one of jurisdiction—conflicting jurisdiction between the United States Government and the State in regard to the administration of waters within a State. While it does not sound very formidable, it is a formidable proposition whichever way it may be determined. * * *

"The question as to whether the Government of the United States shall invade the State and take away from it the things that it gave or conferred upon it when it gave them to the State, is a pretty serious one. If they can do it in one instance, who is going to establish the line where they shall stop? Under the law as it has existed from the beginning the States have administered under the jurisdiction of their own laws the water rights and privileges within the State. This measure proposes to transfer that right from the State to the United States."

* * *

April 6, 1910—Further debate, in part as follows (Congressional Record, Vol. 45, Part 4, 61st Congress, 2nd Session, pp. 4314-4324):

"Mr. Heyburn: Mr. President, as I stated, I am going to speak merely that there may be no misunderstanding. When the individual and the hundreds and thousands of individuals who think they have the right to water under the laws of their State find that Congress has clouded their title and embarrassed it by making a provision in absolute contradiction of their rights, and

they are forced to go into the courts and fight for them, when they win them—and win them they will—they will not feel very kindly toward that legislation or those responsible for it.

"Another thing: There is not a word in the bill that refers to water for any other purpose than irrigation, and yet the constitution of one State, the constitution of my State, and of others, perhaps, provides that irrigation shall stand third on the list in the right to use the water out of the streams of the State. This gives it an exclusive right against the great enterprise of mining, and in our State they are great enterprises, and they depend in a large measure upon these water rights that they are given under our constitution.

"This bill places somebody else in ahead of them, and says the Secretary of the Interior may dole out that which the constitution gave them. When the people discover how they have been thimblerriged by this legislation, somebody will hear from it. The first right under the constitution, in express terms, is that water may be taken to an unlimited extent for domestic purposes. That means to supply cities; that means to supply homes; and that, as I have said, is the first right under the constitution. It is attempted to take it away, and they think they can do it by giving the sole right to the party third in the right under the constitution.

"I should like to hear what the courts will say to them when they undertake to enforce it. I should like to hear what the settlers will say to them when they attempt to defend a measure that undertakes, even though the undertaking may be futile in the end, to take the right away and that puts the burden of the expense of the

fight upon those who are pioneers, who own their own water ditches, or think they do, because of the compliance with the law, and who own them free.

"The water to the prospector, the water to the miner, and the water to the homesteader, is free today under the law. They pay no one for it, because they make a use of it that tends to build up the country and civilization, yet this measure proposes to take that right away and make it subject to the whim and fancy of an officer of the Government here at Washington.

"Talk about legislating for the people. Who are the people? I know about the water organizations. I have seen as many acres of irrigated land as has any man in this chamber. I have lived as close to them as has any man in this chamber. I know what the control of the water means to the country. It can blight it or it can build up its prosperity. You pass this bill, and until it is declared by the courts in violation of the fundamental law of the land these people have got to be engaged in lawsuits and they have got to suffer uncertainty as to their rights; they have got to bear the burden that rests upon a party who must fight the statutes of the United States in the courts. They are not as able to contend for their rights as are these great water corporations. Many of them have only what the soil yields under existing laws with free water. Do you realize that you cut out the right to free water there and that hereafter there will be no such thing?

* * *

"There is no free water to drink under that bill; there is no free water to irrigate the gardens under that bill; and there is no free water to fill the sluice boxes

of the miners under that bill. Power is given to the Secretary of the Interior to sell it to someone else—not to sell it to the homesteader for domestic uses, not to sell it to the miner to fill his sluice box. No such power is given; he is not enumerated in this bill."

* * *

"Mr. Borah: Mr. President, I have been giving some considerable attention to this bill and have studied it with a view of determining what its provisions are and what effect it will have upon the water rights of the citizens of the State which I have the honor, in part, to represent; and I think it a wise and beneficient measure. I think it will serve beneficially those in the State of Idaho who desire to apply water to their individual ownership and to their homesteads.

"I desire to say to the Senate that, under this bill, no one can acquire ultimate title to the use of water until he has found a settler who applies the water to the land, and that, under this bill, in the end, the irrigation works and the right to use the water inevitably end in the ownership of the settler. This bill does not in anywise interfere with, modify, change, or displace the laws of the State of Idaho with reference to the acquisition and the utilization of water. The settler may go upon the stream and appropriate the water just the same after the bill is passed as before. It is not within the power of Congress to change that law, and Congress has not undertaken to do so. Every particle of water which is acquired and used under this bill must be acquired and used under the specific provisions of the laws of the State of Idaho, if it be in that State. We have not undertaken to change that, and we could not do so if we desired to.

"If the Senate will bear with me, I will read the language of the bill, that you may know that I am not in error as to that feature of the bill. It reads:

> 'That whenever in his judgment any part of the water supply of any reclamation project—

When the water supply is on a reclamation project—

> 'can be disposed of so as to promote the rapid and desired development of such project.'

"No. 2, under the proposed act, with reference to the acquisition of water and the reclamation act, the Government must acquire the use of that water by complying with the law of my State, if it be in my State. The Secretary of the Interior must go upon the stream, post a notice, make his application to the State engineer, and utilize it in the method and manner as prescribed by the laws of the State; and when he has acquired water, the Secretary of the Interior then goes, representing the Government, for the use of that reclamation project. This enables the settlers to combine and take over to themselves a part of that water for that particular project—to be used upon that particular project.

"The date of appropriation, the priority of appropriation, the priority of use is undisturbed, and cannot be disturbed by this bill, for we could not disturb it if we undertook to do so, and we do not undertake to do so. There are many conditions in the State of Idaho now where the settler cannot go to the stream and appropriate the water. It has all been appropriated. The Government has gone to the headwaters of the streams, or is going, and building reservoirs, impounding the water, and transmitting it or carrying it 75 or 100 miles to where

the settler is. This bill is designed to enable the Government and the settler to come together for the purpose of utilizing the water, because at the present time only those within the project can deal with the Government. Under this bill those outside of the project who have arid lands which have not any water to cover them may be enabled to deal with the Government.

* * *

"Mr. Borah: Before you can do business under this bill, you must first go to the State and get your water right. This bill does not give any additional power of acquisition of that water right at all. It not only does not do so in its language, but it specifically declares in the proviso that it shall not in any sense or in any way enlarge the right to the acquisition of water under the state law. That being true, before you have the water to be disposed of you must acquire it in accordance with the laws of the State. The laws of the State only permit you to acquire as much as you have lands to apply the water to."

* * *

"Mr. Carter: The Senator is supposing that this bill in some manner will interfere with the laws of the respective states. The Senator well knows that we could not pass an act here which would be valid tending toward the end suggested.

"Mr. Heyburn: The saving clause in the Senator's remarks brings comfort—we could not pass an act which would be valid. I think we are about to pass an act which will be invalid; but an invalid act upon the statute book is an injury to the people. This bill provides that the

Secretary of the Interior may sell the water, notwithstanding the suggestion of my colleague. It provides, under section 3—

> 'That the moneys received in pursuance of such contract

That refers back to the contracts of sales—

> 'shall be covered into the reclamation fund—'

And be used for another purpose.

"Now, the Secretary has sold the water, and of course he must deliver it; and when he has at once sold it and delivered it into the head of the canal, and it goes back on the mountain side, passing the farms along the river, with a dry river bed in front, is not somebody going to be injured? Will not some mines have to close down, some stock be without water, some city be without a water supply?

"Mr. Carter: In no case—

"Mr. Heyburn: Will the Senator pardon me—

"Mr. Carter: In no case will a citizen of a state be deprived of any right existing or acquired under the laws of the State.

"Mr. Heyburn: If I may continue, those are the words of the amendment, but the effect of the bill will be to deprive them of it until they, bearing the burden, establish the fact that Congress had no right to pass this measure.

"There is another thing. Does the Senator from Montana realize that this converts the use of water into a matter for which the user must pay, while today, under

the laws of the State, he does not have to pay anybody for the water; that it substitutes paid water for free water?"

* * *

"Mr. Carter: This bill does not in any manner, shape, or form abridge the right of any individual appropriator or water user in any State; nor could Congress, if it wished, abridge any such right. One of the difficulties in the administration of the reclamation law rests in the rigid rules cast about the government officials in their efforts to endeavor to make a plain business transaction out of it. It costs the Government more because of the rigid rules under which the officers are compelled to operate. The outcome of the venture is limited, because there is not sufficient latitude for contracting upon a businesslike and sane business basis for the utilization of the water and the works constructed.

"The purpose of this bill is to give some such privilege of contract as will enable the Government to proceed in a sane, safe, rational way as an individual would proceed to make the most out of that which he is engaged in."

* * *

"Mr. Heyburn: Section 2 of this bill does just exactly what the Senator from Nebraska (Mr. Burkett) suggests that it does. It takes the money resulting from the sale of the public lands in the State and loans it to private enterprises, that go into partnership with the Government to the extent that the Government builds the reservoirs and collects more water than it has a right to under the law, and by virtue of the terms of the bill sells it to people who have no right to buy it, to the exclusion of

those who are given the right to use it under the constitution. That is rather a singular proposition, but that states it in a nutshell.

"Do you suppose that we are justified, Mr. President, in standing here and enacting a statute in entire disregard of the constitution of a State when the attention of Congress is called to it? This class of purchasers does not include as beneficiaries the right to the free use of water. I call the attention of my colleague to that, and I repeat it—to the free use of water. The constitution says the right to the use of the waters in the streams of the State shall be acquired only through appropriation. Now, Congress comes along and says, 'Well, we will enlarge that right, and we will allow a party to acquire it all by purchase, so that you will have nothing to appropriate.' There is no limit here. Every inch of water in a stream may be impounded and sold, and a party who, under the constitution, is entitled to appropriate it will find nothing to appropriate. That is the difficulty."

* * *

April 14, 1910—Debated, amended and passed Senate (Congressional Record, Vol. 45, Part 5, 61st Congress, 2nd Session, pp. 4662-4669).

"The bill (S. 6593) to provide for the disposition of surplus waters of projects under the reclamation act was considered in the Committee of the Whole.

"The Presiding Officer: The pending question is on the amendment offered by the Senator from Nebraska (Mr. Burkett) to strike out section 2 of the bill.

"The amendment was rejected.

"The Presiding Officer: The question is on agreeing to the committee amendment as amended.

"The amendment as amended was agreed to.

"The bill was reported to the Senate as amended, and the amendment was concurred in."

* * *

"The bill was ordered to be engrossed for a third reading and was read the third time."

* * *

"Mr. Heyburn: Mr. President, this bill in express terms provides that the Government may sell and that the purchaser must pay such price as may be fixed, and submit to such terms as may be imposed by the Secretary of the Interior. The Secretary of the Interior, of course, must be treated as the Government in this case. This is a proposition that the United States Government, through its executive officer, shall take possession of the waters of a State and substitute a system of charge for the existing system that carries no charge. In the first place, the question of power on the part of the United States to do this is involved. No one has as yet undertaken to explain why the Government of the United States should take possession of the waters in the streams of a State and charge the citizen of a State for its use, when the admission act of the State, the constitution of the State, and the laws of the State provide that it shall be subject to the use of the citizens of the State without any charge. I think that when the citizens of the State realize that it is proposed to charge them for that which they now have free of charge, they will probably express themselves in vigorous terms upon this measure.

"It is a very serious thing for Congress to undertake now to repeal not only the charter that it gave to a State, but to repeal the provisions of the constitution of a State. That is what it amounts to. Under the constitution and admission act the rights to the use of water can be had only by appropriation under the laws of the State. Nothing is said about appropriation under the laws of the United States. It is expressly provided that the right to use the water may be acquired only by appropriation.

"Mr. Warren: The Government cannot corral a single thimble of water for itself, except for the purpose of providing it to settlers under the law. The Government, in some of the present projects, is in imminent danger of a cancellation on the part of the States of that water, which has been set aside for it under the contracts that would cause the building of ditches and the delivery of water because of default. The Government cannot hold the water unless it puts it to a beneficial use under the laws, which provide that it must go to those *bona fide* settlers taking 100 acres or less."

* * *

"Mr. Borah: Now, Mr. President, just a word. If the bill provides that the Secretary of the Interior can only dispose of the water of any reclamation project for such project, then we are confined to this limited proposition that whatever water has been appropriated for a particular project may be disposed of for the development of that project. He cannot dispose of it for the development of another project or for other land or to other corporations.

"That being true, I ask my colleague how is the Secretary of the Interior going to dispose of any water except the water which he is not authorized, under the reclamation act, to acquire for the purpose of the reclamation project. If this bill extends any further than that, if it gives any greater latitude, I should be glad to join with my colleague in any language which he may suggest to limit the bill.

"I do not want in this bill the Secretary of the Interior given the power to acquire any additional water. I do not wish him to have the power to dispose of it to anyone other than the settlers upon the project. Now, we are in this situation, Mr. President: The settlers upon the project are entitled to the water which the Government is appropriating. No one else is entitled to it; no one else can get it. Then if the Secretary of the Interior can only dispose of it to them, how does it change the present law other than to permit the settlers to organize themselves into irrigation districts or corporations to take it.

"Mr. Heyburn: Mr. President, the answer to that is obvious. The Government is not authorized to locate or take possession of any particular water in excess of that which is necessary for its own projects, and a Carey Act project is not a government project.

"Mr. Borah: * * * I do not contend for a moment that we could change those laws. The waters of the State belong to the State. It is for the State to determine how they shall be appropriated, how they shall be used, and how they shall be disposed of. Congress cannot change it. We have not undertaken to change it; and therefore when they go to appropriate water for this par-

ticular purpose they appropriate with all those conditions attached to it."

* * *

"Mr. Heyburn: This bill is based upon the proposition that the Government may locate more water than it has use for, when under the laws of the State no other person can do that.

"Mr. Borah: No; Mr. President, this bill is not based upon that proposition, because it limits the water to the project for which it is appropriated."

* * *

"Mr. Heyburn: The language of the bill is that the Secretary may dispose of the water 'upon such terms, including rates and charges, as he may determine.'

"No other person can do that. Are we proposing to give the Secretary of the Interior a right under the laws of the State that no other person would exercise under the laws of the State. That is what this bill amounts to.

"If a man under the law, and in strict compliance with the law, has built a reservoir and corralled the water, any man may go in upon his possession and use that water when the appropriator is not using it, because the appropriator has no title to the water; only to the use of it; and if he is not using it for an hour, a citizen may go in and use it during that hour.

"This bill, in effect, if enacted, would deprive a party of the right to do that, because it provides that during that time, when in the absence of this law anyone might use it, the collector of the water may sell it to somebody else and may select the party to whom he will

sell it. That is utterly antagonistic to the proposition that under the state laws any man might go in and that it requires the consent of no one to use this water in the interval when the appropriator is not using it. But then this goes far beyond that, and it provides that the United States may sell that which belongs to the State; that is, the right to use the water. It seems to me that ought to find a lodgment in the minds and consciences of men. Why should the United States be given a right to use the resources of the State that no settler within the State can have, * * *?"

"Mr. Borah: I again call the attention of my colleague to the fact which I have stated several times, that not only could we not do it, but we are not undertaking to do it. That covers both ends of the proposition.

"Mr. Heyburn: I remember that my colleague made that statement before, and I have it in mind. I agree with him that we cannot do it, but I do not agree with him that we are not undertaking to do it. We are laying a trap here for litigation that will compel parties who ought to have the untrammeled right to exercise the rights and privileges under the constitution to go into court to obtain them. We are confusing the rights they have by legislating upon the subject without any jurisdiction to legislate or any authority; and I am perfectly confident that the courts would hold that this legislation was absolutely ineffective and void. I have no doubt of it. Yet I protest against the people being placed in a position where they must go into court to secure to themselves the rights which they have under the constitution of the State.

"* * * My colleague will not deny that any of the beneficiaries of the water rights of the State could go in the absence of this bill and appropriate the surplus water or the water that flows out of or rests in these reservoirs for their use under the law. * * * I wonder if the Senate of the United States understands the proposition that this measure would result in perpetuating indefinitely the Reclamation Service when it takes upon itself under the contract authorized to be made by the terms of the bill the duty of cooperating indefinitely with irrigation districts, because irrigation dist cts last forever. There is no period fixed by the proposed law when they shall terminate. The language is:

> 'To cooperate with irrigation districts, associations, or corporations for the construction of such reservoirs, canals, etc.'

"What is meant by 'such reservoirs, canals, and so forth'? Not the government canals and reservoirs, but those of the private associations that it is provided by the terms of the bill shall be the beneficiaries of its provisions by purchasing water; not to irrigate government land, but to irrigate private holdings the fee simple of which has passed to the individual. That is what the bill proposes to do. That would be the effect of it.

"Deny it as they will, in express terms it authorizes the Secretary of the Interior, without limitation as to time, to make contracts to furnish water to individuals, corporations, and associations, for use where? In the ditches and canals of the Government? No; for use in the private ditches and canals of the individual. That is what it proposes to do.

"Mr. President, while some Senators may find later on that their States will be affected as seriously as the State of Idaho, yet it seems not to have attracted their attention. Some day they will wake up and find that they have conjured up a master that will impose burdens upon them they never dreamed of.

"It is no argument to say that if the law is wrongfully enacted the courts can say so. That is not an argument in favor of enacting legislation. We might enact every bill that comes into Congress without consideration under such a rule as that. It is astonishing that one proposition should so get control of the minds of men as to master them and blindfold them as to the rights of the people.

"Mr. President, if the bill is to pass this body as it is now presented, I can only say that that which we think is a sovereign part of this country is being shorn of its sovereignty in utter disregard of its rights in an hour of idleness, because when men are not participating in the consideration of great questions it is only fair to say that it is the hour of idleness in this great legislative body. That a great measure is to be considered by so small a number of a responsible body is appalling. Weary? Yes, Senators are weary of it, but they are not half as weary as the people of the States will be when they find what the Senate has done. What would the Senators who are not here think if Congress should propose to disregard the constitution of their States and to repeal it? What would they think?

"Mr. President, if it is to be a question of physical endurance, if nothing else will save the State but physical exhaustion, I would feel justified in standing here until

I sank with fatigue to the floor to plead for the rights of the people. It seems that the State is to be offered up as a sacrifice on the altar of a stubborn determination to ravish its constitution behind smiles. Thank God, you cannot ultimately destroy it. You can only hamper and badger the people, and the people can hamper and badger back again. That is all.

* * *

"It is not a small question because it does not affect the entire country. It affects part of this country more seriously than any question that has been decided at this Congress affects it. It was proposed to take away the right of the free use of the water of the State from appropriation under the laws of the State, to give someone outside of the State the power to sell it, to charge for it, and to put the proceeds in a fund in which the State is not interested. If that question is not serious enough to attract the attention of the Senate, then God help the country.

"Mr. President, I will repeat, for the benefit of Senators who have come upon the floor, that under the laws of the State and under the constitution by specific provision the right to use the water is obtained only through appropriation. This bill proposes that it shall be obtained by purchase from an outsider—a payment for that to which he has no title and no right to sell. That ought to be a question of such importance as to attract the most careful thought and attention of Senators. I have felt impelled and justified to stand here day after day between the people of the State and this great threat. It matters not what we would do today, if we were making a constitution.

"The constitution is made, and it is in force. You propose now to allow the Government—not the Government, but one executive officer of the Government—to take possession of the waters of the streams of the State, and to sell them, not to all the people, but to a selected customer to the exclusion of the people. That is the question you are going to vote on if you vote upon this bill; and I feel more than justified in claiming the attention and the thoughtful consideration of the Senate to this question. It ought not to be a question of physical endurance, but it ought to be one of careful attention.

* * *

"I intend that when the Senate acts upon this measure it shall have had an opportunity of acting right. That is my intention. If I could prevent this outrage upon a sovereign State by standing here until doomsday, I would do so and I would feel justified in doing so. That the rights of the people of a State should be made the subject of a jest is intolerable, and especially so in this body, where the States are assembled on an equal footing and in duty bound to give consideration to the questions that involve any or all of the States. We gather here in solemn assemblage to consider some sensational piece of legislation and sit with waiting ears to catch every sound that falls, because the newspapers are going to discuss it and to discuss the men and their attitude toward it; but when a State, even though far distant from this Capitol, stands here begging and pleading for its existence—because if you can violate or repeal the least clause in its organic law you can take away every right that it has under it—but scant consideration is given. There is a principle involved in this matter, and it will be a sad day for other States when you establish

here the doctrine that because this is a right that does not affect others than those in our own particular section of the country it may be either ignored or treated lightly."

April 15, 1910—Referred to house committee on Irrigation of Arid Lands (Congressional Record, Vol. 45, Part 5, 61st Congress, 2nd Session, p. 4790).

May 26, 1910—House reported with amendment (H. Rep. 1410). Bill and report were referred to the Committee of the Whole House on the State of the Union (Congressional Record, Vol. 45, Part 6, 61st Congress, 2nd Session, p. 6949).

January 27, 1911—Recommitted to Committee on Irrigation on Arid Lands—(Congressional Record, Vol. 46, Part 2, 61st Congress, 3rd Session, p. 1548).

January 27, 1911—Reported with amendment (No. 2002)—said bill and report referred to the Committee of the Whole House on the State of the Union (Congressional Record, Vol. 46, Part 2, 61st Congress, 3rd Session, p. 1584).

February 7, 1911—Debated, amended and passed House—(Congressional Record, Vol. 46, Part 3, 61st Congress, 3rd Session, p. 2190):

"Mr. Reeder: Mr. Speaker, I move to suspend the rules and pass the bill (S. 6953) authorizing contracts for the disposition of waters of projects under the reclamation acts, and for other purposes, as amended, which I send to the desk and ask to have read.

"The Clerk read as follows:

"'Be it enacted, etc., That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under the projects, the Secretary of the Interior, preserving a first right to lands and entrymen under the projects, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the act of August 18, 1894, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contracts shall be for the purpose of distribution to individual water users by the party with whom the contract is made: Provided, however, that water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contracts for impounding, storing, or carrying water for any irrigation system, corporation, association, or district, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored, or the canal by which it is to be carried, and such charges shall be just and equitable as to water users under such project.

"'In fixing rates and charges in such contracts for the storing or carrying of water to any irrigation system, corporation, association, water users, or district, as herein provided, the Secretary shall take into consideration the cost of construction and main-

tenance of the reclamation project, and such rates and charges shall be just and equitable as to water users under such project. No irrigation system, district, association, or corporation, so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid by it to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through its works.

"'Sec. 2. That in carrying out the provisions of said reclamation acts and acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users, associations, corporations, entrymen, or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users' associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes: Provided, That the title to and management of the works so constructed shall be subject to the provisions of section 6 of said act: Provided further, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate 160 acres: Provided, That nothing contained in this act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

"'Sec. 3. That the moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms for the reclamation act and the acts amendatory thereof or supplementary thereto.'

"The title was amended so as to read: 'An act to authorize the Government to contact for impounding, storing and carriage of water, and to cooperate in the construction and use of reservoirs and canals under reclamation projects.'

* * *

"Mr. Reeder: Mr. Speaker, this bill will have the effect of expediting the irrigation of lands in the West on account of these conditions. In many of the irrigation projects there is a large amount of land which can be irrigated. There is generally but one right good place to impound the waters, and the Government has followed the plan of separating the project into units, and in doing so certain lands that could be irrigated cannot be irrigated for a number of years, yet a large percent of the initial expense for the whole project is necessarily made at first. This bill provides that when the Government has undertaken a project and started in to build a reservoir and ditches, if private individuals desire to come in and take another unit of that same project and assist in building the dams and ditches and paying for the extra expense necessary to this land, the Government will permit the impounding of the waters therefor in the reservoir and carry this water in the Government ditches.

"Mr. Mann: Will the gentleman yield?

"Mr. Reeder: Yes, sir.

"Mr. Mann: If the gentleman will permit, I will not occupy any of my own time, but use some of his. The gentleman is the chairman of the committee which reported this bill, which is a Senate Bill. The bill as reported is materially different from the bill as it passed the Senate. The Senate bill, in my opinion is very ob-

jectionable. Is it the intention when this bill passes the House in the shape that it is reported to the House to reinstate the provisions of the Senate bill without even controversy?

"Mr. Reeder: Mr. Speaker, I think I am safe in saying that the Senate will not ask that such provision be reinserted. If they do, we will certainly insist that our provisions remain in the bill, for the reason our changes have been made largely if not entirely with the idea of not establishing a system of selling water, but simply of permitting the impounding and carrying of the water which is appurtenant to their lands.

"Mr. Mann: It was feared by many, Mr. Speaker, when the Reclamation Service was provided for, that it would lead in the end to the Government expending large sums of money for the benefit of private individuals who were then owners of lands. That fear is in part realized by the provisions of this bill. I am not entirely certain, but they are in part realized by the provisions of the bill as amended by the House committee. I have always been perfectly willing to provide for the Reclamation Service. I am not in favor of the Government, at Government expense, providing for the irrigation of the lands of individuals or turning over the water to companies out there to make profit by being middlemen between the water which is reserved and the water which is used. With those observations, as far as I am concerned, I do not propose to say anything more.

"The Speaker: The question is on the motion to suspend the rules and pass the bill.

"The question was taken; and two-thirds having voted

in favor thereof, the rules were suspended, and the bill was passed."

February 9, 1911—Senate disagreed to the amendments of the House and asked for a conference. Conferees appt.—Senators Warren, Jones and Bailey (Congressional Record, Vol. 46, Part 3, 61st Congress, 3rd Session, p. 2190).

February 10, 1911—House insists on its amendments and agrees to a conference. Conferees—Reeder, Cole and Smith of Texas (Congressional Record, Vol. 46, Part 3, 61st Congress, 3rd Session, p. 2319).

February 15, 1911—Conference Report (H. Rep. 2168) made in House (Congressional Record, Vol. 46, Part 3, 61st Congress, 3rd Session, p. 2615).

"Mr. Reeder: Mr. Speaker, I ask unanimous consent that I may present at this point a conference report on the bill S. 6953 authorizing contracts for disposition of waters under the reclamation act, for printing in the Record.

"The Speaker *pro tempore:* The gentleman from Kansas reports a conference report for printing in the Record.

"The Conference Report (No. 2168) and statement are as follows:

Conference Report.

"The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the Bill (S. 6953) authorizing contracts for the disposition of waters of projects under the reclamation act, and for other purposes, having met, after full and free

conference have agreed to recommend and do recommend to their respective Houses as follows:

"That the Senate recede from its disagreement to the amendments of the House numbered 9, 12, and 13, and agree to the same.

"Amendments numbered 1, 2, 3, 4, 5, and 6: That the Senate recede from its disagreement to the amendments of the House numbered 1, 2, 3, 4, 5, and 6, and agree to the same with amendments as follows: Strike out all of the matter in section 1 of the bill, and all of the matter proposed to be inserted in said section, and insert in lieu thereof the following:

"That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the act of August 18, 1894, known as the Carey Act, and individuals, corporations, associations, irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: Provided, however, that water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in

private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

"And the House agreed to the same.

"Amendment numbered 7: That the Senate recede from its disagreement to the amendment of the House numbered 8, and agree to the same with an amendment as follows: In the matter proposed to be inserted strike out the apostrophe which appears after the word 'corporations' and insert in lieu thereof a comma; and the House agree to the same.

"Amendment numbered 10: That the Senate recede from its disagreement to the amendment of the House numbered 10, and agree to the same with an amendment as follows: Strike out the apostrophe which appears in said amendment; and the House agree to the same.

"Amendment numbered 11: That the Senate recede from its disagreement to the amendment of the House

numbered 11, and agree to the same with an amendment as follows: In the matter proposed to be inserted strike out the apostrophe which appears after the word 'corporations' and insert in lieu thereof a comma; and the House agree to same.

"Amendment as to title: That the Senate recede from its disagreement to the amendment of the House as to the title, and agree to the same with an amendment as follows: In lieu of the title proposed in said amendment insert the following: 'An act to authorize the Government to contract for impounding, storing and carriage of water, and to cooperate in the construction and use of reservoirs and canals under reclamation projects, and for other purposes:' and the House agree to the same.

W. A. REEDER,
RALPH D. COLE,
W. R. SMITH,
Managers on the part of the House.

F. E. WARREN,
W. L. JONES,
J. W. BAILEY,
Managers on the part of the Senate.

Statement.

"The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the House to Senate bill 6953, authorizing contracts for the disposition of waters of projects under the reclamation act, and for other purposes, submit the following written statement in explanation of the effect of the action agreed upon by the conference com-

mittee and submitted in the accompanying report as to each of the amendments of the House, viz.:

"On amendments Nos. 1, 2, 3, 4, 5, and 6: Provide for carrying and impounding water, as proposed by the House, instead of disposing of water, as proposed by the Senate.

"On amendments Nos. 7 and 8: Make verbal correction in the text of the bill.

"On amendment No. 9: Provides that the use of reservoirs as well as the construction of reservoirs may be contracted for, as proposed by the House.

"On amendments Nos. 10, 11, 12, and 13: Make verbal corrections in the text of the bill.

"On amendment No. 14: Gives to the bill the title proposed by the House.

W. A. REEDER,
RALPH D. COLE,
W. R. SMITH,
Managers on the part of the House.

February 17, 1911—Conference report made and agreed to in the Senate (Congressional Record, Vol. 46, Part 3, 61st Congress, 3rd Session, p. 2755).

February 17, 1911—Conference report debated and agreed to in the House (Congressional Record, Vol. 46, Part 3, 61st Congress, 3rd Session, pp. 2780-2784).

"Mr. Reeder: Mr. Speaker, I desire to cal' up the conference report on the bill (S. 6953) * * * and I ask the unanimous consent that the statement be read in lieu of the report (Statement read)."

* * *

"Mr. Mann: Mr. Speaker, I think we ought to have an explanation of this report.

"Mr. Reeder: As it passed the Senate this bill provided for the disposition of water. The House committee held that Congress does not have the right to provide for the disposition of water; that water is appurtenant to the land, and that whoever by a proper course secures the water for his land makes the water appurtenant to that land. Therefore we changed the bill so as to provide for impounding and carrying the water, rather than for disposing of it. The Senate conferees agreed with us on every proposition. There were some changes made, however, in the phraseology and punctuation, and those are all the changes that were made in the bill as it was amended by the House.

"Mr. Mann: What were the differences between the House and the Senate?

"Mr. Reeder: The Senate proposed to dispose of the water. The House simply provided that when a person had secured the water for his land by the ordinary process to impound and carry the water, and that we do not have the power to dispose of the water.

"Mr. Mann: This is water in a reclamation project, is it not?

"Mr. Reeder: No; it is excess water in a reclamation project.

"Mr. Mann: Well, it is water in a reclamation project.

"Mr. Reeder: No; it is not; because if it were in a reclamation project it would be necessary for that project, but it is water that is in a stream where, after all the water necessary is used in the reclamation project, a

surplus remains. In many cases there is only one good place to impound the water, and by making the dam higher and permitting these people to pay for the extra expense and making the ditch a little larger they can carry water that does not belong to the project to land that the water does not belong to.

"Mr. Mann: This proposes to have the Government and private parties enter into a partnership, does it not?

"Mr. Reeder: Yes, sir.

"Mr. Mann: And under that the Government pays part of the expense of the dam and private parties pay the rest?

"Mr. Reeder: Yes; that is partly what it is intended for; but the dam is to remain entirely under Government control.

"Mr. Mann: We can all imagine how well the Government is likely to have its interests protected.

"Mr. Reeder: The bill provides that no water can be carried or disposed of until sufficient water is provided or reserved for the whole of the irrigation project. After that, if there is surplus water and no good place to store it, then by paying the expense necessary to make the reservoir large enough to store it and to make the ditches large enough to carry it, the outside parties can carry their water through the ditches to their own ditches."

* * *

"Mr. Taylor of Colorado: When the Government of the United States, in locating these reclamation projects, determines the amount of land there is to irrigate and the size of the reservoir and the size of the canal necessary

to irrigate it, what is the purpose of their having excess capacity, and why should they do so?

"Mr. Reeder: Because there are other lands, in small tracts, or perhaps some taken under the Carey Act, that will find plenty of water after the Government has withdrawn what it wants for the purpose of irrigating the lands under the project, but the Government has taken the only practical place to store the water. The result is that after the Government has reserved all that is necessary for their project, if private individuals wish, they can put up the money (the Government still retaining control of the dam) to enlarge the reservoir or widen the ditches, and they can carry the surplus water which belongs to their land. Without this these lands would not be irrigated at all in some places.

"Mr. Taylor: Why should the Government of the United States have any right to appropriate more water than they need any more than should an individual?

"Mr. Reeder: We claimed that the Government did not have any such right, and hence we provided that anyone else that claimed the water should have a right to use it under conditions provided in this bill.

"Mr. Taylor: Is not there danger in this proceeding of having the Government of the United States put to the expense of building irrigation works and appropriating, we may say, water for the purpose of allowing a large number of private individuals to get water at the Government expense very cheaply?

"Mr. Reeder: We have provided in our amendment that the Government shall not impound or carry water for others unless there is an excess over what is needed on the lands under the project. Then the Government,

having the reservoir, when others furnish the money, may increase the size of the reservoir and increase the carrying capacity of the ditches and permit those who furnish the necessary funds to use the surplus water on their own land.

"Mr. Taylor: Does it not strike those on the committee who have had practical experience in irrigation operations of the west that this is rather an adroit entering wedge for the purpose of the government controlling our waters in that country?

"Mr. Reeder: I am very anxious not to do anything that will invalidate or deprive the people of the full benefits of the national irrigation law. I take great pride in this law. I think it is one of the greatest movements inaugurated by Congress since I have been a member. By means of this law homes are being made for at least 30 persons each day out of desert lands, and these citizens are placed thereby under conditions which are favorable to the development of the highest type of citizenship."

* * *

"Mr. Mondell: Now, answering the gentleman's question as to what the bill does and how it can affect water rights, let me assure the gentleman it cannot; that these contracts which are provided for cannot affect the water right of any entryman under a reclamation project or under any unit of a reclamation project for this reason, that when the reclamation project is inaugurated or initiated the water rights for the entire project and all units of it are filed, and the right dates from the time when the water right application is made, provided due diligence is used in building works; so that the first rights

are those under the project, and nothing can be done, nothing is contemplated in this bill, nothing that we could do could take from the project the water necessary for the irrigation of all of the lands under the project.

"Mr. Mann: Does the gentleman mean we could not do it?

"Mr. Mondell: No; we could not do it, because the water rights are obtained from the State, and the water right dates from the date of application, work proceeding with reasonable diligence. So, as a matter of fact, we could not, if we were disposed to do it, which, of course, the House is not, take a water right from any land included in a project. But the first section of the bill provides that if a surplus has been provided by impounding reservoirs, as in the case of the North Platte, for instance, above the amount which will be needed for the irrigation of all lands under the entire project, the Secretary may make contracts for the use of the surplus of the impounded water. That can in no wise or under any circumstances affect any entryman on any project, but it is a contract which is pure velvet, if I may use that sporting expression, to the Reclamation Service, in that it brings to the service an increased income without any further outlay."

* * *

"Mr. Reeder: I would like to make a further remark or two in regard to this bill. First, I wish to state that but for the purpose of providing that the Government should not undertake to dispose of the water we should have made no amendments to this bill. The next proposition is this—

"Mr. Taylor: Mr. Speaker, I want to ask the gentleman from Kansas (Mr. Reeder) a question. * * *

"Mr. Taylor: In the last sentence of Section 2 why is this language used?

> 'Provided, that nothing contained in this act shall be held or construed as enlarging or attempting to enlarge the right of the United States under existing laws to control the waters of any stream in any state.'

"Why should you put in anything that even indirectly assumes to give the United States control over our streams?

"Mr. Reeder: We desired to make it clear that the Government has no right to running water.

"Mr. Taylor: Why did you not say so? Why did you not provide, then, that the United States shall not be construed to have any authority?

"Mr. Reeder: That is what we do provide.

"Mr. Taylor: You say 'shall not be construed to have any enlarged authority.' Why do you tacitly recognize that it has any authority at all?

"Mr. Reeder: We amended this bill in such a way as to allay and set aside any suspicion that anyone might entertain that the Government had the right to the water.

"Mr. Taylor: If you intended to do that, I must say that the language hit upon was not very happy. I do not agree with you.

"Mr. Reeder: That may have been an unfortunate use of language. I believe there is danger that these men who obtain surplus water under this bill may finally ob-

tain the sole right to water that should go to landowners under the project. Now, I answered my conscience in this matter in this way: That if all the water in the stream is used near its source to produce crops, the sooner this can be consummated the better, and each comer will likely get water in the order of his putting it to beneficial use. We cannot in any way increase the amount of water, and the well-established principle in water ownership for irrigation of 'first come, first served' is probably best after all, whoever gets left."

* * *

"The Speaker: The question is on agreeing to the conference report.

"The question was taken, and the conference report was agreed to."

February 10, 1911—Examined and signed.

By the House (Congressional Record, Vol. 46, Part 3, 61st Congress, 3rd Session, p. 2926).

By the Senate (Congressional Record, Vol. 46, Part 3, 61st Congress, 3rd Session, p. 2929).

February 21, 1911—Approved and signed by the President (Congressional Record, Vol. 46, Part 4, 61st Congress, 3rd Session, p. 3174).

THE BILL AS PASSED.

(U. S. Statutes at Large, Vol. 36, Part 1—pp. 925, 926.)

Chap. 141—An Act to authorize the Government to contract for impounding, storing and carriage of water, and to cooperate in the construction and use of reservoirs and canals under reclamation projects, and for other purposes.

(February 21, 1911—S. 6953—Public No. 406.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however,* That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, associa-

tion, corporation, or individual so contracting shall make any charge for the storage, carriage or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

Sec. 2. That in carrying out the provisions of said reclamation act and acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals or ditches as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes: *Provided*, that the title to and management of the works so constructed shall be subject to the provisions of section six of said Act: *Provided further*, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: *Provided*, That nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

Sec. 3. That the moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms of the reclamation Act and the Acts amendatory thereof or supplementary thereto.

Approved, February 21, 1911.

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APPENDIX II.

Extract From Record and Exhibits.

EXTRACT FROM TESTIMONY OF ANDREW WEISS, FORMERLY NORTH PLATTE PROJECT MANAGER, COMMENCING RECORD PAGE 20,782.

Q. Now, Mr. Weiss, when the return flows are used on the river to supply the appropriators from the river, that, of course, releases water further up the stream, does it not?

A. It should, certainly.

Q. If, for instance, an appropriator on the river with a priority of, we will say, 1892, is supplied with water from the return flow from the drains, that appropriator then has no demand upon water rising further upstream, that is correct, isn't it?

A. That is correct.

Q. And when the appropriators senior to 1904 in the Scottsbluff area are supplied with water taken from the drains or from the invisible accretions in the stream, that enables the Interstate Canal and the Gering-Fort Laramie Canal to take water that might not otherwise be available for them, isn't that right?

A. Yes, sir.

Q. That was the practice, was it not, during the time that you were project engineer or project manager?

A. That was the practice insofar as it was physically possible to do so.

Q. And that was the uniform practice, was it not, while you were there, so far as the return flow waters were available in that way?

A. So far as it was within our power to do so.. For instance, we diverted from the Sheep Creek into the Tri-State Canal, which was in accordance with a court decision. The river administration was in the hands of the State authorities, with whom we did not interfere.

Q. The diversion of the Sheep Creek water into the Tri-State Canal was treated by the Nebraska Department as what they called an optional diversion, was it not?

A. I am not sure how they treated that.

Q. What I mean is, the quantity which was diverted into the Tri-State Canal from Sheep Creek was deducted from the headgate diversions of the Tri-State from the river, so that the total diverted both from Sheep Creek and from the river would not exceed the amount of their appropriation, that is correct, is it not?

A. I think that is correct.

Q. And that, of course, is, in effect, an exchange of water?

A. Well, yes.

Q. So that, by using the Sheep Creek water, a portion of the North Platte river water that would otherwise be taken by the Tri-State was released for other appropriators lower down, that is correct, isn't it?

A. I presume so.

EXTRACT FROM TESTIMONY OF R. I. MEEKER, RECORD, PAGES 26212 TO 26214.

Record, page 26212:

Q. Do you have any knowledge or information as to the nature of the records before 1904, as to their reliability?

A. Yes. I was an engineer and hydrographer with the Geological Survey from 1903 to 1904, in the Denver district, and in those days we had very limited funds for hydrographic work, or securing of river records. The Denver district included Wyoming, Colorado, eastern Utah and northern New Mexico, and I did make a few trips

Record, page 26213:

into Nebraska; that also, of course, included Colorado. But I know then that sometimes we only had enough money to get—where the gage rod was some distance from an observer, we used to get one reading a day, either in the morning or in the evening, instead of two readings.

And then there were other stations where the distance was so great we couldn't afford to pay the observers enough to pay to make more than a trip every other day. We didn't have the funds for travel like we have now, and we had to get along with fewer discharge measurements. Especially on high water years we might miss the deep flow and get a measurement very much less. I had occasion when I started on this work for Nebraska to study the records prior to 1904 at Guernsey, Orin Junction, and various points on the river above Guernsey,

and I found that the meter measurements were somewhat infrequent, much less than what we would like to have for good measurements; that some of the gage readings were infrequent. If I recall correctly, those readings were made only every other day, but I am not absolutely positive as to that; I know some of them were made once a day. So those records made in those earlier years, not only on the North Platte river, but all over the others, do not carry the reliability of the present-day records with automatic gages and adequate meter measurements on which to predicate or to base the discharge curves.

For that reason, I rejected all measurements prior to 1904.

Q. Were there any automatic recorders in those days?

Record, page 26214:

A. None whatever.

Q. The measurements are all based upon spot readings at an interval of a day or two days?

A. Staff day readings. I wouldn't call them spot observations; I would call them actual gage readings of insufficient frequency.

Q. And what is the value of frequent meter measurements?

A. As I stated, to be the basis of an accurate discharge curve to apply to the gage heights.

CROSS EXAMINATION BY MR. GOOD ON BEHALF OF NEBRASKA OF ELMER K. NELSON WITH REFERENCE TO WYOMING EXHIBIT 176, RECORD, PAGES 27773 TO 27787.

Record, page 27773:

Q. Mr. Nelson, you have, on Exhibit 176, what might be called an operation table of the operation of the river upon the assumptions contained in the preceding exhibits, is that correct?

A. Yes, that is correct.

Q. And, of course, that depends upon the demands which you have assumed for the areas below Pathfinder, such as 950,000 acre-feet demand, seasonal demand, May to September demand, between Whalen and Tri-State dam?

A. That is correct.

Q. And these other demands that you have further down?

A. The other demands that I have above, as to these demands of the Whalen-Tri-State dam section, are added to the demands of the Kendrick project, and that includes the supplying water below the Tri-State dam.

Q. In carrying the water down in your exhibits you carry it only down to Kingsley dam and Keystone?

A. There is a value which shows what the future run-off would be under the conditions not shown in this exhibit, at North Platte, Nebraska.

Q. You assume that the Keystone or Kingsley would take care of all the requirements below?

A. Yes.

Q. Regardless of whether they have water-rights near the Kingsley or not?

Record, page 27774:

A. That is correct.

Q. In connection with the operation of the three reservoirs—Seminoe, Pathfinder and Alcova—which you show in Exhibit 176, you make no distinction between rights of Wyoming in Pathfinder water and rights of Wyoming in Seminoe water?

A. No. This is based upon the use of the reconstructed water fund throughout. It is a water-supply study.

Q. And therefore bears no relation to the actual operation whereby some irrigators are entitled to rights from Pathfinder storage and some are not?

A. No. This is an analysis of the water supply; this is not an analysis of water-rights.

Q. And your study does not show whether this analysis of water supply could be operated practically in view of the differences in water-rights that exist below Pathfinder?

A. Oh, yes, it does; it shows there is a water supply for all.

Q. There is a water supply for all, assuming it all pooled and banded together, but it does not show what would happen if the demand were applied only to the supply available for that particular demand; it does not show what would happen under those circumstances, does it?

A. I don't understand that.

Q. Well, take, for example, some of the private canals in Wyoming below Whalen and above the State line have Warren Act contracts, and some do not. That is correct, is it not?

Record, page 27775:

A. That is correct.

Q. Those that do not have Warren Act contracts are not permitted, as a matter of practical operation, by the Wyoming authorities, to take Pathfinder storage water?

A. That is a matter of administration.

Q. That is a matter of administration, but that is also a matter that has to be taken into account in the operation of irrigation projects on the river?

A. That is a water-supply study which is based upon a determination of requirements and how those requirements can be met. This is a lawsuit between states and not between water-rights of one state and water-rights in another state.

Q. Well, let the Court decide what the suit is about, from the pleadings, but let us get an answer to this question. It is a fact, is it not, that in order to know how the river is going to be operated in the future, you have to apply the demand to the supply which is legally available to that canal, isn't that correct?

A. Yes. That is what I have done.

Q. You have assumed, however, that all these private canals in Wyoming, between Whalen and the State line, can get water from Pathfinder storage, if that is necessary?

A. If it is necessary, yes. I have made a determination of what they would have, taking water from Pathfinder storage, if they have such a right, and it is not necessary to —

Q. Your study does not show whether it is necessary or not,

Record, page 27776:

does it?

A. No; it is an analysis of water supply.

Q. And if a study should show that it was necessary, in order to give those canals the supply which your operation table gives them, then, in order to get the results which you show in Exhibit 176, you would have to give it to them, would you not?

A. Well, you know, when there is plenty of water, there is no administration required.

Q. And in connection with the Kendrick supply, you make no distinction as between the Seminoe and the Pathfinder reservoirs, as to whether the Kendrick project is getting the water from Pathfinder storage or Seminoe storage?

A. Not at all. The whole demand is placed against the water supply, together with the storage available.

Q. And, conversely, you make no distinction as to whether the Seminoe storage supply is being made available to those projects which have rights only under the Pathfinder?

A. Not at all; that is correct.

Q. You know, of course, that there are Warren Act contracts in existence for supplying Pathfinder storage water to some canals below the Tri-State dam?

A. I do not; that is, these contracts do not necessarily imply that Pathfinder water is to be supplied to them, but waters from all sources aggregating a certain amount. That is what they say.

Q. And you have even gone to the extent of cutting down some

Record, page 27777:

of those Warren Act contracts giving, for instance, the Brown's Creek Irrigation District less water than the Warren Act contract calls for?

A. I am giving it what it wants.

A. I haven't set out anyone's cut with that point in view; I have set out to determine what they want as a water supply or what is a sufficient water supply for those ditches.

Q. But the allotment that you make on the Brown's Creek is less than the Warren Act contract in evidence in this case calls for, isn't that right?

A. I think that is correct.

MR. WEHRLI: Just a moment. I object to that as placing an interpretation upon the contract. Each one of these contracts contains a restriction to beneficial use, and I rather think that your interpretation of the contract is unfounded.

Q. Now, the same thing is true, of course, with reference to the Tri-State allotment of water; the allotment of water to the Tri-State is less than the Warren Act contract calls for?

MR. WEHRLI: I object to that again, as to counsel placing a certain interpretation upon the contract. The contract very definitely states that the use under the contract shall at no

Record, page 27778:

time exceed what is required for beneficial use or such use as can be made beneficially upon the lands of the project.

A. I do not recall the conditions of that contract very well. I recall that somewhere there has been stated a certain quantity of water, which quantity as stated

is in excess of the amount of this requirement.

Q. In connection with the operation of the table which you have in Exhibit 176, there are times when the total storage shown in Column 3 is less than the capacity of the reservoir?

A. Yes, that is correct.

Q. That is true, for example, well, we will say in 1939, when, during July, August and September, the storage comes down from 966,000 in July to 667,000 at the end of September?

A. That is right.

Q. You make no distinction as to whether that water is going to be made available to the Kendrick or the Pathfinder —

A. No distinction whatever.

Q. — or to the Pathfinder users?

A. That is correct.

Q. The same condition happens from time to time throughout the last 10-year period, does it not?—in 1934, 1935, 1936, 1937, 1939 and 1940, in each of those years there are some months where the total storage of all three reservoirs togther is less than the

Record, page 27779:

Pathfinder capacity?

A. There are.

Q. Have you analyzed that water to determine whether it is Pathfinder water or Kendrick or Seminoe water?

A. No, I have not.

Q. It is possible, is it not, that due to the graphs that have been made previously by the different projects, that water all might be Pathfinder water?

A. I can't say as to that. I have made no study as to the separation of those waters.

Q. As a matter of fact, then, this operation table bears no relation to the actual rights and the actual operational uses that can be made in the operation of the river of this Pathfinder and Seminoe storage, respectively?

A. Oh, yes; full consideration has been given throughout to the satisfying of those rights.

Q. But not to the question of what those rights apply to—not to the question of whether the water can legally be furnished to those rights; that question has not been brought into your picture at all?

A. No; the water supply is there to be furnished to all the rights.

Q. That is, you are assuming that that Pathfinder water, as run out of the Seminoe water, can legally be used on the Interstate Canal, is that right?

Record, page 27780:

A. I have stated heretofore that all this water fund has been pooled in connection with the reservoir system at Pathfinder, which is now constructed and in operation, —

Q. And then you assume —

A. I beg your pardon. I am not quite finished — and that under those conditions, with all the projects in operation, which takes into account the return flows of Kendrick project, and other accretions, the rights will be fully satisfied, and that the period could have met the requirements or demand for water throughout.

Q. You have assumed, then, that the Kendrick project can use Pathfinder storage water after the Seminoe has been emptied, when there is no more Seminoe water left?

A. I have said several times, Mr. Good, I have made no such assumptions whatever.

Q. That is necessarily involved in your theory of pooling the water, is it not?

A. Not necessarily.

Q. Will you explain to me where, in this study, you show that the thing can be operated without the Kendrick using the Pathfinder water?

A. I haven't said that it could and I haven't said it could not. I have said that I haven't made such a determination.

Q. I notice, Mr. Nelson, that at the end of September, 1940, you show a total storage content of all three reservoirs of 169,000 acre-feet.

Record, page 27781:

A. That is correct.

Q. If the demands were increased by ten per cent, the whole reservoir system would be emptied during the summer of 1940, would it not?

A. Well, that would depend upon other factors. For example, as is customary in studies of this kind, the calculations assume uniformity in requirements, taking supplies as they come. However, there are times throughout these periods, like the 1931-1940 period, when — for example, on the Whalen-Tri-State dam section, perhaps even on other projects as well, they got the demands that are shown here, that it would not have been necessary to release. But this is a customary procedure. I have made no other determination from it, excepting I wanted to find out that there would be, as there usually are, years when that amount of water does not need to

be released, so that the rights will secure all the water they want, together with precipitation and other local supplies.

Q. Now, the last spill which you show is on Sheet 16, for the month of June, 1933?

A. That is correct.

Q. So that for the succeeding seven years, all the water supply that comes in is used under your operational table by the demands that are applied against it, and still you have 169,000 acre-feet left at the end of the period?

A. That is correct.

Q. If the 1934 demand were increased by ten per cent, that

Record, page 27782:

would be 4,000 acre-feet more water used, would it not?

A. You mean the demand out of Pathfinder for Whalen-Tri-State dam section?

Q. Yes.

A. Yes, ten per cent of that value would be four thousand.

Q. And leaving out altogether the Kendrick demand, let us take just the demand Whalen-Tri-State dam section, and add ten per cent each year, and you would run out of water in 1939, would you not?

A. Yes, I think that is probably correct.

Q. And even adding five per cent, you would run out of water before 1940, would you not?

A. Yes, that is correct.

Q. From 1917 to 1930, Exhibit 176 shows total spills of a little over seven million acre-feet, does it not?

A. I haven't added those.
Q. Well, that is about right, is it not?
A. I don't know. I have no way of knowing. I have never made the addition.
Q. That would be about 502,000 acre-feet per year, if it were seven million —
A. Now, let me see. Your period is —
Q. 1917 to 1930.
A. If you have added it correctly and divided it correctly, I presume that is the amount.
Q. What does your plan of operation undertake to do with that

Record, page 27783:

500,000 acre-feet per year which apparently is uncontrolled waters?
A. The plan of operation here only takes into account the controlled water supplies. I have taken that into no account whatever. I have indicated on later exhibits what, on the average, those spills would amount to when they reach the Kingsley reservoir.
Q. Have you taken into account the fact that by allowing a higher demand for the Whalen-Tri-State dam area, all that water could be utilized?
A. Well, I have stated heretofore that any such water, as well as excess waters, originating below Alcova, can be used to any extent they want to use it. In my opinion, that would not result in any way in the amount of water ultimately, under present conditions, reaching Kingsley reservoir, but it might be a good thing if you would divert some of this excess so that some of it would turn into return flows and have a better distribution by the time it got down

to Kingsley, and have the better part of it usable for that reason.

Q. As a matter of fact, you have cut down the demand and eliminated all the demand below the Tri-State dam in order to arrive at this 169,000 acre-feet storage contents in September of 1940, isn't that a fact?

A. That is untrue, absolutely.

Q. It is only by reason of this drastically reduced demand that your operation table shows storage contents in these reservoirs at all times?

A. The true demand has not been reduced in any respect. The

Record, page 27784:

full supply is available under these conditions of Kingsley reservoir. The requirement, used as demand, was worked out, and the study was begun in the Whalen-Tri-State dam section. It was taken here and worked backwards. If that is what you mean, that is exactly the situation. I have reduced no demand; I have computed and allowed for full requirement in this area.

Q. That is what your opinion is of full requirement? That is what you mean, is it not?

A. Exactly, it is my opinion.

Q. And not the requirement that past experience shows was imposed?

A. I haven't seen any past experience that indicates the requirement from which these data have been prepared.

Q. Exhibit 176 gives to the Kendrick project, priority of 1931, the full supply of water during the full 37-year period?

A. You say that the Seminoe reservoir has a priority of 1931?

Q. For the priority of 1931 it gives the full requirement throughout the entire 37-year period?

A. Exactly.

Q. And the Interstate Canal, with a priority of 1904, gets less than the average of what it got during the 1931 to 1940 period? That is correct, is it not?

A. I think they got about the same.

Q. Well, for the May-September period it got less, but with the winter water which you allow here, it gets practically the same, does

Record, page 27785:

it not?

A. About the same, yes, that is correct.

Q. And that in spite of the fact that during the 1931 to 1940 period there were at least two years when the lands under the Interstate Canal got less than .6 per acre?

A. I think that is what you read from the record yesterday.

Q. In spite of that, you gave the Kendrick project a full supply of water?

A. I have shown that it was available for them.

Q. Any spills which your operation table shows come during the May and June period, do they not?

A. I haven't examined them for that purpose. I presume they do. They usually would come in May and June. The greatest spills ordinarily would occur in June.

Q. Except in the year 1917 you have no year when you show any spill for later than June?

A. Yes; in 1907 there is a spill in July - -

Q. That is exceptional, however, is it not?

A. - - and in 1917. Yes, that is exceptional, as indicated on another exhibit.

Q. The period when those spills come is not the period when the projects in the Whalen to Keystone area are in real need of water or have been getting short, is it? The period is in the early season when usually there is a pretty fair supply for the projects below Whalen?

Record, page 27786:

A. Yes. For that reason they would not need to use anything but spills; they wouldn't have to make a draft on the storage, as a matter of fact, and any adjustment of that kind is allowed for in a study such as this.

Q. These spills come at a time when they would not be useful for these projects that you have cut down to your low water requirement, isn't that right?

A. Well, the usable water - - whenever they have any need of any up-river water, they would always use it.

Q. I say, these spills come at a time usually when they are not demanding water beyond the normal fund?

A. I think that is generally true, that that would happen in a reservoir system, and it is for that reason that we build storage, and it is for that reason that we are able to deplete the runoff above Pathfinder to the extent that we have; that is, the water generally that is used is water which would be spilled water anyway if it were not used. I think that statement is true; I think spills as a general rule, throughout the system are waste waters and not controlled by storage.

Q. And these spills as you have put them here create a waste where, in an operation which would permit them to be held back until July and August, they would be conserved?

A. Yes. That kind of an operation is proposed by the Seminoe reservoir and the Kendrick project.

Q. But your operation table shows that that is not successful

Record, page 27787:

during large periods with the average of 500,000 acre-feet spill 1917 to 1930?

A. The storage capacity is not sufficient to control all the runoff at Pathfinder; even with your runoff adjusted, it is still inadequate.

Q. Have you compared this operation with the actual historical spills that were made when the Pathfinder alone was used?

A. There are no historical spills.

Q. You mean that - -

A. There is no record of historical spills at all.

Q. You mean, when Pathfinder alone is in operation, it never spills?

A. Yes, it did spill, but a spill is the amount of water which would flow over the spillway of a dam, provided that the release from the gates were cut down to the amount required for uses below. The gates have a capacity several times greater than the amount required for actual operation of discharge, and therefore the spill is the sum of two valves in the reservoir - - the excess that is charged to the gates, plus the amount that went over the spillway - - and I say we have no record of that.

Q. Well, it is a fact, is it not - -

A. Unless a comparison is made with these values here, which include the three reservoir studies, with the amount of water being Pathfinder storage. You might determine some sort of a spill in that case.

PART OF SHEET 1, NEBRASKA EXHIBIT 6

NORTH PLATTE RIVER INFLOW PATHFINDER RESERVOIR, WYOMING

Values in Acre-feet

	1931	1932	1933
October	64,400	31,200	32,400
November	31,400	25,300	36,300
December	28,600	19,400	22,600
January	18,600	20,100	22,000
February	23,300	20,100	18,800
March	40,300	44,300	50,200
April	119,000	235,000	98,900
May	147,000	456,000	222,000
June	171,000	435,000	513,000
July	25,800	163,000	77,300
August	20,100	42,000	25,000
September	16,800	15,200	31,000
Totals	706,300	1,506,600	1,149,500

PART OF SHEET 1, NEBRASKA EXHIBIT 7

NORTH PLATTE RIVER AT PATHFINDER DAM, WYOMING
REGULATED OUTFLOW FROM PATHFINDER RESERVOIR

Values in Acre-feet

	1931	1932	1933
October	12,000	31,200	18,700
November	12,300	4,610	4,600
December	7,190	2,180	3,690
January	6,270	2,150	3,070
February	2,740	2,010	3,350
March	3,070	941	1,080
April	2,560	0	790
May	121,000	65,200	0
June	317,000	336,000	314,000
July	296,000	376,000	344,000
August	197,000	280,000	303,000
September	26,800	211,000	152,000
Totals	1,003,930	1,311,000	1,148,280

PART OF NEBRASKA EXHIBIT 611

1930 - 1940

WATER ENTERING NEBRASKA VIA INTERSTATE CANAL

Records of Pathfinder Irrigation District

Measured at Mile 50.8 (Near State Line) 2 Small Laterals Not Included
Staff Gage Readings; Infrequent Meter Measurements
Values in Acre-Feet

Records 1930 to 1937 Furnished by C. F. Gleason, Engineer U. S. Bureau Reclamation
Records 1938 to 1940 Furnished by T. W. Parry, Manager Pathfinder Irrigation Dist.
R. I. Meeker, Engineer

Year	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Totals
1930	17,910	39,590	75,770	95,640	81,860	58,400	4,030	.....	373,200
1931	9,530	60,130	90,530	75,430	74,780	5,090	15,760	19,200	250,450
1932	25,230	55,440	73,600	94,400	57,030	85,550	46,980	370	438,600
1933	13,310	43,470	83,590	95,060	95,180	68,540	22,580	.....	421,730
1934	9,700	22,470	21,420	20,210	34,680	.....	.....	.....	108,480
1935	.....	13,260	43,550	80,760	75,990	17,150	.....	.....	230,710
1936	23,060	68,170	53,910	62,090	61,240	16,090	.....	.....	284,560
1937	12,120	50,510	58,010	81,210	91,440	67,630	3,960	.....	364,880
1938	16,160	49,110	57,690	71,400	92,380	58,840	7,780	.....	353,360
1939	9,050	69,900	49,900	62,380	65,380	26,380	.....	.....	282,990
1940	.....	34,490	20,860	35,340	51,580	.....	.....	.....	142,270

PART OF WYOMING EXHIBIT 180

(a) 128.6 M. Acre Feet, Undivertible, included. Data from Stream Flow and Diversion Records.

WYOMING EXHIBIT NO. 180

Elmer K. Nelson, C. E.

1941

NORTH PLATTE RIVER

WATER PASSING TRI-STATE DAM — HISTORICAL.

1931-1940

Thousands Acre Feet

	May	June	July	Aug.	Sept.	Total
1931	16.3	22.0	7.5	10.8	2.0	58.6
1932	27.7	36.6	53.0	22.8	5.8	145.9
1933	(a) 146.0	51.6	44.5	24.6	18.8	285.5
1934	4.4	5.4	3.0	2.2	1.1	16.1
1935	23.6	71.5	7.2	9.0	1.6	112.9
1936	13.2	24.4	14.4	4.1	3.3	59.4
1937	11.1	31.4	48.9	6.0	1.4	98.8
1938	37.5	16.2	14.1	9.9	17.0	94.7
1939	12.9	10.1	10.5	6.4	1.1	41.0
1940	9.0	14.0	5.1	2.7	1.6	32.4
Means,	30.1	28.3	20.8	9.9	5.4	94.5
Undivertible (a)	12.8					12.8
Divertible Passing	17.3	28.3	20.8	9.9	5.4	81.7

PART OF U. S. EXHIBIT 204 D, 1939 U. S. CENSUS REPORT

From Pages 24, 25, Lines 18, 22

IRRIGATED AREAS MORRILL AND SCOTTS BLUFF COUNTIES, NEBRASKA

	1929	1939
Morrill	87,306 acres	79,962 acres
Scotts Bluff	193,816 acres	200,468 acres
Totals	281,122 acres	280,430 acres

PART OF COLUMN 34, SHEET 1, U. S. EXHIBIT 273

NET GAIN OR LOSS PATHFINDER TO GUERNSEY MAY TO SEPTEMBER, 1933

May	187,000 acre-feet
June	10,200 acre-feet
July	−5,300 acre-feet
August	10,200 acre-feet
September	11,300 acre-feet

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